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Supreme Court, U.S.
FILED

No. 09-09-222 AUG 20 2009

OFFICE OF THE CLERK
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In The

Supreme Court of the United States

BECKY MATHENY, JOHNNA LAWRENCE,
AND THOMAS LAWRENCE,

Petitioners,

v.

TENNESSEE VALLEY AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an admiralty action arising from the drowning of Ronald Matheny caused by the negligent operation of a Tennessee Valley Authority ("TVA") tugboat in a small inland harbor under TVA's complete ownership, dominion, and control. Reversing the district court's judgment for petitioners (and in conflict with decisions of two other circuits), a Sixth Circuit panel ruled that TVA enjoyed the protection of the Limitation of Liability Act (46 U.S.C. § 30505(a) & (b)) because the tugboat's captain was qualified when hired and had a clean safety record up to the point of the accident in question, even though the captain was at all times under the direct supervision and control of TVA management. The court of appeals further held that the limitation applied even as to petitioners' direct action against TVA under state law for its negligent supervision of the captain (not just its vicarious liability for the captain's negligence as a matter of admiralty law).

The questions presented are:

1. Whether the Limitation of Liability Act insulates a ship owner from vicarious liability for the negligence of an otherwise competent ship's master even when the owner is physically present and has direct control over the vessel's operations; and

2. Whether, as a newly minted proposition of federal admiralty law, the Limitation of Liability Act

QUESTIONS PRESENTED – Continued

even insulates a ship owner from liability in a direct action for negligent supervision under state law, so long as its hiring of the immediately responsible tortfeasor was not negligent.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are listed in the caption. The petitioners are not corporations.

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PETITION FOR A WRIT OF CERTIORARI

Becky Matheny (the widow of Ronald Matheny), Johnna Lawrence, and Thomas Lawrence respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. at 1-22) is reported at 557 F.3d 311. The order of the court of appeals denying rehearing (App. at 105) is unreported. The judgment and opinions of the district court (App. at 23-104) are reported at 523 F. Supp. 2d 697 and 247 F.R.D. 541 (M.D. Tenn. 2007) (the latter consisting only of a supplemental memorandum and order increasing the damages award).

JURISDICTION

The court of appeals entered judgment on February 19, 2009, and denied petitioners' timely petition for rehearing and suggestion for rehearing en banc on May 22, 2009. This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Limitation of Liability Act, now codified at section 30505 of Title 46, provides in pertinent part:

> **§ 30505. General limit of liability**
>
> (a) **In general.** – Except as provided in section 30506 of this title, the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight. * * *
>
> (b) **Claims subject to limitation.** – Unless otherwise excluded by law, claims, debts, and liabilities subject to limitation under subsection (a) are those arising from any * * * loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner.

46 U.S.C. § 30505.[1]

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[1] As the court of appeals noted, App. at 8 n.2, Congress amended and codified the Limitation of Liability Act on October 6, 2006, but without any substantive change to the law. *See* Pub. L. No. 109-304, § 6(c), 120 Stat. 1513. The statute previously appeared at 46 App. U.S.C. § 183(a) (2000).

INTRODUCTION

It is undisputed that the negligent operation of a speeding TVA tugboat under the direct supervision and literally within the sight of land-based TVA management caused the drowning of a blameless Ronald Matheny in an inland harbor in Tennessee that TVA owned and controlled. The district court found that the damages to Mr. Matheny's survivors totaled over $3.3 million, and it also awarded $238,685 to the Lawrences. By operation of the Limitation of Liability Act, the effect of the Sixth Circuit's ruling, if allowed to stand, would be to cap the total award to all plaintiffs at $415,000 (the stipulated value of the aging tugboat).

The Sixth Circuit has made bad law, and created a circuit conflict along the way, by giving an unduly expansive interpretation to the Limitation of Liability Act that completely ignores the *control* that the ship's owner (TVA) had over the vessel. In the Sixth Circuit's view, TVA is immune from respondeat superior liability for its master's "navigational error" simply because it had exercised due care in selecting him, regardless of the control that it exercised on the scene. *See* App. at 8-19.

At least two other circuits, however, have recognized that "the theory supporting limitation when the master commits navigational errors" has *two* components. The first component consists of the owner having exercised due care in selecting the master (which is undisputed here). But second, the

owner must be "so far removed from the vessel that he can exert no control over the master's actions . . . ." *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1377 (5th Cir. 1983) (en banc) (denying limitation); *In re MO Barge Lines, Inc.*, 360 F.3d 885, 891 (8th Cir. 2004) (citing *Continental Oil* with approval on this point, but allowing limitation for a collision on the Mississippi River).

The Sixth Circuit's decision overlooks the second requirement for limitation when based upon a previously-competent master's navigational error. By doing so, it sets a precedent for leaving innocent plaintiffs with essentially no recourse (depending on the value of the vessel in question) for even the most flagrant acts of negligence on the part of a ship's master, regardless of the degree of control that the ship's owner actually exerted (or was in a position to exert) over the vessel. As argued below, neither the statute's language nor its purpose supports such an unjust outcome, and this Court should grant review to establish a uniform rule that will prevent such fundamental unfairness going forward.

The court of appeals also created bad precedent by holding, in effect, that the Limitation of Liability Act precluded TVA's liability for its own negligent supervision of the tugboat captain as a matter of Tennessee law (the district court having also found that TVA was directly liable to petitioners on this separate basis). *See* App. at 19-21. By so holding, the Sixth Circuit failed to follow this Court's decision in *American Car & Foundry Co. v. Brassert*, 289 U.S.

261, 264 (1933), which squarely holds that the Limitation of Liability Act does not apply to direct actions against a ship owner for its own negligence (as opposed to respondeat superior liability based on the fact of ownership). But more fundamentally, the Sixth Circuit's decision stands for the insidious proposition that a corporate or governmental ship owner has no duty to supervise its own vessels or the employees operating them even in confined bodies of water that it owns and controls, and even when the owner is already directly supervising them. This aspect of the Sixth Circuit decision has far-reaching implications because it vitiates the distinction between employees and independent contractors under federal admiralty law.

STATEMENT OF THE CASE

1. On June 5, 2005, Ronald Matheny and Thomas Lawrence were fishing in the harbor of TVA's Cumberland Steam Plant (a/k/a Cumberland Fossil Plant) on the Cumberland River in Stewart County, Tennessee. (TVA owns and operates several such coal-fired electric power generating plants in its system.) The excessively high wake of a speeding TVA tugboat, the "Patricia H," collided with the small fishing craft (which Lawrence owned), causing it to capsize. After struggling in the water for several minutes, Mr. Matheny drowned just before the crew of the Patricia II was about to rescue him. He was forty-nine

years-old at the time of his death, and left behind a wife, three children and six grandchildren.

2. In TVA's own words, it "own[ed], control[led], or otherwise occupie[d]" the area where the accident occurred and had done so continuously since the early 1970s. *See* App. at 108-09 (TVA Interrogatory Answer introduced into evidence as Ex. P-69). The harbor was quite confined; the tugboats operated in an area of no more than 2000 feet in length along the edge of the harbor, ferrying barges of coal from their moorings to an unloader and then returning the empty barges for retrieval by the barge companies. The harbor was only 400 feet wide, roughly.

3. The steam plant harbor was a popular fishing area. In fact, TVA had affirmatively promoted this recreational activity by building a ramp where fishing boats (and other recreational craft) could put in.

4. Although the tugboats necessarily operated with a master and small crew, land-based TVA management personnel directly supervised the activities of the tugboats and the barges, which were always literally within sight and in radio contact. According to Captain Jeff Ralls (the Patricia H's master at the time of the accident), he worked "under the direct supervision of management on land." If a supervisor on shore wanted to give him an instruction, the supervisor radioed it to Ralls. As Captain Ralls described his position: "Really my job is just to move a barge from point A to point B. I mean a

manager is above me dictating what I do during the day." It is undisputed that TVA management kept careful track of the barges in its harbor and the activities of the tugboats that handled them.

5. Correspondingly, David Duke, the plant's "coal haul foreman" and Captain Ralls's immediate supervisor, testified that Ralls and the other tugboat operators were supposed to do what he told them, follow his orders, and were not free to do whatever they wanted when they left the dock. In other words, he confirmed the truth of Ralls's testimony that the tugboaters were under management's direct supervision (from management's own perspective).

Duke further testified that he and the other managers monitored the tugboats for any deviation from TVA policies and procedures, including safety rules on the water. TVA policy required tugboat masters to follow the "Inland Rules of Navigation." Duke knew that one such rule required the tugboats to operate with "as minimum disturbance as possible" in the presence of smaller craft, and he expected the tugboat masters to produce "as little as possible wake" in the presence of fishing boats. Had he seen a tugboat captain going too fast, Duke admitted that it would have been his job to "call them down about it."

6. Nevertheless, Mr. Duke never communicated his expectation about producing as little wake as possible in the presence of recreational craft to Captain Ralls. Ralls testified that if "his boss" had

told him to operate with no wake when fishing boats were present, he would have done so.

7. Invoking the admiralty jurisdiction of the federal courts, Ronald Matheny's widow, Becky, filed suit on behalf of herself and the Matheny children in the United States District Court for the Middle District of Tennessee on May 31, 2006. TVA filed a third-party complaint against Thomas Lawrence, the owner of the fishing boat (who was fishing with Mr. Matheny), and then Mr. Lawrence and his wife filed a counter-claim against TVA. Although TVA primarily asserted (at first) that Captain Ralls had not been negligent at all (while also attempting to shift at least some of the fault to Mr. Lawrence), it did raise the partial defense of limitation under the Limitation of Liability Act, which would, if applicable, limit TVA's liability to the value of the Patricia H itself (approximately $415,000).

8. United States District Judge Aleta A. Trauger conducted a bench trial over the course of November 6-9, 2007. On December 6, 2007, Judge Trauger issued a Memorandum and Opinion finding that: (a) Ralls's negligent operation of the Patricia H caused the capsizing of Lawrence's boat and Matheny's death; (b) TVA was also liable for Matheny's death by reason of its own negligent supervision of its employee, Ralls; (c) TVA did not establish that it was entitled to limitation of liability under the Limitation of Liability Act, 46 U.S.C. § 30505; and (d) the "discretionary function" doctrine

did not shield TVA from liability for Matheny's death. App. at 24-86.

9. Judge Trauger ultimately awarded $3,324,352 in damages to Becky Matheny and the three Matheny children, of which $3.2 million went to loss of consortium. The Court awarded Thomas Lawrence and his wife, Johnna, a total of $238,685 based on the injuries that Thomas Lawrence had sustained. App. at 97, 104.

10. On appeal to the United States Court of Appeals for the Sixth Circuit, TVA explicitly abandoned the defense that Captain Ralls had not been negligent, admitting (at least for purposes of the appeal) that he had negligently operated the Patricia H at an excessive speed and caused the accident. Instead, TVA now led with the argument that the district court had erred in holding that the Limitation of Liability Act did not limit TVA's respondeat superior liability for Captain Ralls's negligence. TVA also argued that the district court had erred in finding that TVA had negligently supervised Captain Ralls as a separate basis for liability under state law.

11. A three-judge panel of the Sixth Circuit heard oral argument on January 23, 2009. On February 19, 2009, the panel issued a unanimous opinion reversing the district court's findings of TVA's liability and holding that, in accordance with the Limitation of Liability Act, TVA's liability was limited to the value of the Patricia H. The court of appeals left it to the district court to apportion that amount

between the Lawrences and Becky Matheny on remand. App. at 21-22.

12. The court of appeals hinged its ruling on the proposition that TVA could not be liable for the navigational error of an admittedly competent master with a clean record, relying in large part on its earlier decision in *The Longfellow*, 104 F. 360 (6th Cir. 1900), which the court of appeals characterized as "dispositive." The court did not in any way address the virtually total control that land-based TVA management exercised over the tugboat operations, ending its analysis with the indisputable fact that Captain Ralls, an otherwise competent and qualified master, had committed a "navigational error." *See* App. at 8-19.

13. The court of appeals devoted little attention to the district court's separate finding that TVA was directly liable to petitioners because of its own "negligent supervision" of Captain Ralls, effectively holding that the Limitation of Liability Act also insulated TVA from liability under this state law theory. App. at 19-21. The court ignored petitioners' argument that this Court's decision in *American Car & Foundry Co. v. Brassert*, 289 U.S. 261 (1933), constitutes controlling authority to the contrary.

REASONS FOR GRANTING THE WRIT

This case presents two issues warranting this Court's review: (i) whether the Limitation of Liability Act insulates a ship owner from vicarious liability for the negligence of an otherwise competent ship's master even when the owner is physically present and has direct control over the vessel's operations; and (ii) whether the Limitation of Liability Act insulates a ship owner from liability in a direct action for its own negligence under applicable state law, so long as its hiring of the immediately responsible tortfeasor (here, the ship's master) was not negligent.

The salience of these issues is enhanced by the context in which they arise. The undisputed negligence of a TVA employee caused the death of Ronald Matheny. Except for $415,000 (the value of the Patricia H), the Sixth Circuit's construction of the statute wipes out the just compensation to which his survivors are otherwise entitled. Nothing in the statutory language calls for this exceedingly harsh result, nor does it even further the statute's original purpose. The Sixth Circuit has split with at least two other circuits by declining to consider the ship owner's *control* as part of the analysis of the limitation issue. Neither legal reason nor wise policy justifies this departure, which leaves the door open to similar injustices in the future. Moreover, the holding that as a matter of federal admiralty law, a vessel owner has no duty under otherwise applicable state law to supervise its employees even in its own harbor is a dangerous and unwarranted precedent.

I. The Circuits Are Split Over The Issue Of Whether Courts Applying The Limitation Of Liability Act In Cases Arising From A Master's Negligence Should Also Consider The Ship Owner's Control Over The Vessel, Once It Has Been Determined That Employment Of The Master Was Not Negligent.

Enacted in 1851, the Limitation of Liability Act's original purpose was "to ensure that American shipping attracted investment capital that the threat of unlimited exposure might divert to England, which already provided for limited liability." *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983) (en banc) (internal quotation marks and citation omitted). More broadly stated, "[t]he great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry." *Norwich Co. v. Wright*, 80 U.S. 104, 121 (1872).

The Act advanced Congress's intent by affording protection from respondeat superior liability to "the *physically remote* owner who, after the ship breaks ground, has *no effective control* over his water-borne servants." *Tittle v. Aldacosta*, 544 F.2d 752, 756 (5th Cir. 1977) (emphasis supplied). Simply put, Congress made a policy judgment that the owner's lack of control under such circumstances warranted an exception to the general rule of vicarious liability, all to the end of promoting the nineteenth century American shipping industry.

Having predated both the dominance of the corporation as the business organization of choice in this country (thereby providing limited liability to ship owners and other businesses that choose to incorporate) and the current breadth of insurance protection (likewise unavailable in 1851), the Act has been aptly characterized as "hopelessly anachronistic." *In re Hellenic, Inc.*, 252 F.3d 391, 394 (5th Cir. 2001) (Higginbotham, J.). At the risk of belaboring the obvious, the Act's application in this case has absolutely nothing to do with the encouragement of ship-building. In view of the statute's original purpose, its application here is absurd. But the statute undeniably remains on the books as a potential safe harbor for limited liability, however far removed from its original purpose.

That being the case, it bears emphasis that this Court long ago held that because it is in derogation of the common law, the Act should be strictly construed, and should not be applied to "limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress." *The Main v. Williams*, 152 U.S. 122, 132-33 (1894). Somewhat more recently, this Court has observed that because the conditions that led to the Act's original passage no longer exist, "[j]udicial expansion of the Limited Liability Act at this date seems especially inappropriate." *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 437 (1954) (Black, J., dissenting). In keeping with that admonition, the "discernible judicial trend" over time has been to narrow the Act's scope by

construction, in contrast to the Sixth Circuit's expansive interpretation of the statute in this case. *Continental Oil Co. v. Bonanza Corp.*, *supra*, 706 F.2d at 1376 (quoting G. Gilmore & C. Black, The Law of Admiralty 878 (2d ed. 1975) [hereinafter cited as "Gilmore"]).[2]

In terms of the statutory text, the issue here is whether TVA was "without the privity or knowledge" of Captain Ralls's negligent act that tragically killed Mr. Matheny and injured Mr. Lawrence. As expressed by a still-leading treatise, the terms "privity or knowledge" in this context "are phrases devoid of meaning," "empty containers into which the courts are

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[2] On this point, it bears noting that there appears to be something of a conflict within this Court's own pronouncements as to whether the Limitation of Liability Act should be broadly or narrowly construed. Despite the clear mandate of strict construction that the Court laid down in *The Main v. Williams*, *supra*, 152 U.S. at 132-33 (which followed from the simple fact that the statute was in derogation of the common law), the Court in *Coryell v. Phipps*, 317 U.S. 406 (1943) (Douglas, J.) (which appears to constitute the Court's most recent interpretation of the statutory text itself), seemingly recognized a rule of broad, liberal construction of the Act. *See id.* at 411 (quoting *Just v. Chambers*, 312 U.S. 383, 385 (1941)). The *Just* Court, in turn, cited to this Court's 1871 decision (not long after the Act's 1851 enactment), in *Norwich Co. v. Wright*, *supra*, 80 U.S. at 121. This appears to be a misreading of *Norwich Co.*, in which the Court observed that the then-recent statute should be given a "fair natural construction" in view of its purpose. *Id.* But in any event, the seeming inconsistency in the Court's own pronouncements as to how lower courts should construe the statute arguably gives rise to another reason for granting the writ in this case.

free to pour whatever contents they will." Gilmore, *supra*, at 877. Significantly, however, and as the court of appeals recognized, the burden of proving lack of privity or knowledge is on the owner. App. at 8-9.

Moreover, when (as here) the owner of a vessel is a corporation or government entity, "the owner is charged with privity or knowledge of an officer, manager, or superintendent who has authority over the scope of activities out of which the liability occurred." *Id.* at 9 (citing *Coryell v. Phipps*, 317 U.S. 406, 410 (1943)).[3] And as this Court's decision in *Spencer Kellogg & Sons, Inc. v. Hicks* ("*The Linseed King*"), 285 U.S. 502 (1932), amply reflects, the responsible officers, managers, and superintendents need not have actual knowledge of the negligence if, on the facts of a given case, they had a "duty to control" and "ought to have found out" about the negligence. *See* Gilmore, *supra*, at 887-88 (discussing *The Linseed King*). Such is the case here.

A. Review is Warranted to Address the Circuit Split Over the Interpretation and Application of the Limited Liability Act When an Otherwise Competent Master Has Committed a Negligent Act.

The Sixth Circuit held that TVA lacked "privity or knowledge" because Mr. Matheny's death resulted

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[3] The *Coryell* Court affirmed an allowance of limitation to an *individual* vessel owner in a brief opinion. *Id.* at 407-12.

from "navigation error" on the part of a qualified, otherwise competent master, as to whom TVA had exercised due care in employing. *See* App. at 8-19. Period. Insofar as the court was concerned, that ended the discussion of "privity or knowledge," regardless of the exceptional control that TVA management exerted over the vessel and Captain Ralls.

At least two other circuits, however, most notably the en banc Fifth, have recognized that there is a second inquiry to be made in a determination of limitation *vel non* in a "navigational error" scenario. Assuming the owner has first established that it exercised due diligence in employing the master (the initial inquiry), a court must go on to consider whether the owner was in no position to exert *control* over its vessel. If it was not, limitation applies; if it was in position to exert control, no limitation. This second step advances the statute's original purpose, which was to protect the "physically remote" owner who had no effective control over its "water-borne servants" (thereby promoting investment in the shipping industry). *See Tittle v. Aldacosta*, *supra*, 544 F.2d at 756.

The unanimous en banc Fifth Circuit recognized this requirement in *Continental Oil Co. v. Bonanza Corp.*, *supra*, 706 F.2d 1365.[4] *Continental Oil* arose from the sinking of a vessel (owned by Bonanza

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[4] There was a dissent, but on an unrelated issue. *See id.* at 1378.

Corporation) that Conoco (the operator of an offshore drilling rig) had time-chartered. The district court denied limitation to Bonanza, finding that the vessel's captain was Bonanza's managing agent *vis-à-vis* the vessel's operations. *Id.* at 1367.

Writing for the court, Judge Alvin Rubin first recognized that no court had ever previously denied a corporate ship owner limitation of liability for a master's navigational errors at sea when the owner had exercised reasonable care in selecting the master (as was the case in *Continental Oil*). *Id.* at 1377 n.15. But this is the point at which the court then recognized that the inquiry in the case of a master committing navigational error is "two-fold." "First, when the owner exercises due care in selecting the master, he discharges his obligations and he may thereafter rely on the master's skill and expertise. Second, when the owner is so far removed from the vessel that he can exert no control over the master's actions, he should not be taxed with the master's negligence." *Id.* (citing Gilmore, *supra*, at 877).

Bonanza Corporation satisfied the first "fold"; there was no question about the master's "skill and expertise." *See id.* at 1375-76. But on the unusual facts that the case presented, Bonanza retained "control" over the master's action (thereby foreclosing limitation) because the corporation had granted the master himself *so much* autonomy in the management of the vessel that he was more than a master and even more than the corporation's managing agent. *See id.* at 1376-77 (describing the unusual

facts, including the fact that the master received a portion of the vessel's profits, not a fixed salary). Although the Fifth Circuit itself did not use the term, the master functioned as Bonanza's "alter ego." Consequently, the district court had not erred in attributing the master's privity and knowledge to the corporation. *Id.* at 1377.

Continental Oil is factually distinguishable (we are not contending that Captain Ralls occupied an equivalent role), but the case plainly stands for the legal principle that the owner's *control* is essential to the "privity or knowledge" inquiry. In that case, the master's unique autonomy gave rise to the corporation's "control" of the vessel; here, TVA's direct supervision of its tugboat operators within the narrow confines of the Cumberland Steam Plant harbor (which TVA owned and controlled) constitutes a level of control that precludes limitation.

While denying limitation, the court in *In re Hellenic, Inc.*, 252 F.3d 391 (5th Cir. 2001), expounded to some extent on the "absence of control" requirement for allowing limitation under the Act. Writing for the court, Judge Higginbotham observed that the limited liability doctrine is "sensitive" to the scope of an owner's control over his agents. "Thus, a master's navigational errors at sea are generally not attributable to the owner. When the owner is so far removed from the vessel that he can exert no control over the master's conduct, he should not be held to the master's negligence. In such cases, the owner may rely on the master's skill and expertise." *Id.* at 396

(citing *Continental Oil*) (footnotes omitted). Thus, while articulating a general rule of limitation in "navigational error" cases, the *Hellenic Inc.* court still adhered to the requirement of "no control" (which was met in that case).

Judge Higginbotham went on to write that "[t]his reasoning is consistent with the principle that the duty to control increases along with the possibility of control." *Id.* "Where greater supervision is *not* possible – e.g., where the master is at sea, far from the owner's control – limited liability is more desirable." *Id.* (emphasis supplied). In contrast to the *Hellenic Inc.* court, the Sixth Circuit was utterly oblivious to TVA's ability to control tugboat operations in its own small harbor (not to mention the fact that it was actually exercising direct supervision over those activities).

Finally, in *In re MO Barge Lines, Inc.*, 360 F.3d 885 (8th Cir. 2004), an Eighth Circuit panel affirmed the district court's allowance of limitation to a corporate tugboat owner in a case arising from a collision on the Mississippi River. Along the way, however, the court adopted the Fifth Circuit's "two-fold" approach to liability limitation when a master commits navigation errors. *Id.* at 891 n.5 (citing *Continental Oil, supra,* 706 F.2d at 1377). Insofar as the opinion reflects, there was no issue about the remote owner's lack of control over the master's actions while plying the relatively open waters of the Mississippi (in stark contrast to the Cumberland

Steam Plant harbor, in which the tugboats traversed no more than 2000 feet on any trip).

Insofar as petitioners have been able to determine, these are the only two circuits that have *explicitly* adopted the "absence of control" requirement for an owner's entitlement to limitation under the Act. On the other hand, there appear to be no other circuits that have allowed limitation to an organizational ship owner on facts reflecting anywhere near the degree of control that TVA had in this case.

B. Review is Warranted Because this Case Presents a Question of Exceptional Importance.

The Sixth Circuit's decision, if allowed to stand, will wreak a profound injustice upon the Matheny and Lawrence families, with literally *no* justification. None. From where they stand (lifting Justice Stewart's famous formulation from a different realm), the result might be said to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Cf. Furman v. Georgia,* 408 U.S. 238, 309 (1972) (Stewart, J., concurring). The implications of the Sixth Circuit's decision go much further, however.

The Sixth Circuit's holding in this case has the future capacity to prevent an indeterminate class of injured persons from being made whole on a basis that cannot be found in the statute's amorphous text, Congress's original intent in enacting the Limitation of Liability Act (long since displaced in any event), or judicial precedent. In fact, the result is so arbitrary and capricious that it implicates both the Fifth and Fourteenth Amendments' protections of due process and equal protection.

Insofar as undersigned counsel have been able to determine, this Court has not addressed an organizational ship owner's limitation of liability under the Act since its 1932 decision in *The Linseed King*, *supra*, 285 U.S. 502 (reversing allowance of limitation to a corporate owner). Congress has not only allowed this "hopelessly anachronistic" statute to remain the law of the land, but even recodified it in 2006. Consequently, the lower federal courts will continue to define the meaning of the inherently meaningless phrase "privity or knowledge" on the facts of specific cases. Especially in view of Congress's recent rejuvenation of this nineteenth century statute, it is time for this Court to provide much-needed guidance as to the Act's proper construction so that blameless persons will not continue to be largely deprived of recourse.

II. The Court Should Grant Review Because The Sixth Circuit's Decision Also Constitutes Fundamentally Flawed Precedent For The Proposition That Government Agencies And Other Organizational Ship Owners Have No Duty To Supervise Their Employees And The Operations Of Their Own Vessels In Confined Bodies Of Water That They Own And Control.

The district court also assessed liability against TVA on the alternative basis of negligent supervision. App. at 82-85. The Sixth Circuit's two-paragraph disposition of the issue is cryptic at best, *see* App. at 19-20, but it plainly cannot be squared with this Court's holding in *American Car & Foundry Co. v. Brassert*, 289 U.S. 261 (1933). The *American Car* Court unequivocally held that the Limitation of Liability Act does not apply to direct actions against ship owners for their own negligence (as opposed to respondeat superior liability *qua* owner for the negligence of their agents). *Id.* at 265-66.

More importantly, however, the public policy implications of the Sixth Circuit's ruling on this point are downright harrowing, and cry out for this Court's review.

Petitioners have already described the narrow confines of the Cumberland Steam Plant "harbor," as well as TVA's self-professed dominion and control over it. Nevertheless, at least as the Sixth Circuit would have it, TVA has *no duty* to supervise the operations of its own tugboats in its own waterway, *this despite*

the fact that land-based TVA management actually does directly supervise the tugboat operations. And closely at that.

These seemingly innocuous lines of the opinion are of profound significance. They announce new federal law. The Sixth Circuit's decision constitutes a literally dangerous precedent of federal admiralty law that should not be allowed to stand. It is self-evident that a ship owner who exercises the degree of dominion and control over a waterway that TVA has over the Cumberland Steam Plant harbor has a duty to supervise the operations of its own vessels.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 20, 2009

557 F.3d 311 (6th Cir. 2009)

Becky MATHENY, Individually and as Surviving Spouse of Ronald Matheny, Deceased, Plaintiff-Appellee,

v.

TENNESSEE VALLEY AUTHORITY, Defendant/Third-Party Plaintiff/ Counter Defendant-Appellant,

Johnna Lawrence; Thomas Lawrence, Third-Party Defendants/ Counter Plaintiffs-Appellees.

No. 08-5127.

United States Court of Appeals, Sixth Circuit

Argued: Jan. 23, 2009.

Decided and Filed: Feb. 19, 2009.

ARGUED: Edwin Warren Small, Office of the General Counsel, Tennessee Valley Authority, Knoxville, Tennessee, for Appellant. Philip N. Elbert, Neal & Harwell, Nashville, Tennessee, Mark McClure Mizell, Law Office, Franklin, Tennessee, for Appellee. **ON BRIEF:** Edwin Warren Small, Jared E. Mitchem, Thomas A. Robins, Office of the General Counsel, Tennessee Valley Authority, Knoxville, Tennessee, for Appellant. Philip N. Elbert, W. David Bridgers, Neal & Harwell, Nashville, Tennessee, Mark McClure Mizell, Law Office, Franklin, Tennessee, Jonathan R.

Perry, The Perry Firm, Franklin, Tennessee, for Appellee.

Before SUHRHEINRICH, GRIFFIN, and KETHLEDGE; Circuit Judges.

OPINION

SUHRHEINRICH, Circuit Judge.

This is an admiralty action arising out of a collision in which the wake of the Defendant-Appellant Tennessee Valley Authority (TVA) tugboat Patricia H capsized a small fishing boat. Plaintiff Ronald Matheny, a passenger in the fishing boat, died as a result. After a bench trial, the district court concluded that Matheny's death was caused by the negligent operation of the tugboat and that the TVA was not entitled to limitation of liability under the Limitation of Liability Act, 46 U.S.C.A. § 30505 (West 2007), because the captain's actions were within the privity or knowledge of TVA. The TVA appeals. We **REVERSE** in part and **REMAND** for further proceedings.

I. Background

A. Facts

The facts, issues, and relevant law are all adequately presented in the district court's fifty-seven page opinion and supplemental opinion following a bench trial and are very briefly summarized here. *See Matheny v. TVA*, 523 F.Supp.2d 697 (M.D.Tenn.2007),

modified in part by Matheny v. TVA, 247 F.R.D. 541 (M.D.Tenn.2007).

TVA operates the Cumberland Fossil Plant (CFP), a coal-fired electric power generating plant, on the south bank of the Cumberland River at river mile 103 in Stewart County, Tennessee. *See* TVA Act of 1933, 16 U.S.C. §§ 831-831ee (2000 & Supp. V 2005). In the 1970s, TVA excavated a second channel and created an island approximately 6,000 feet long between the two channels. TVA has a coal barge unloader and barge mooring cells along the south side of the old channel. Since the early 1970s, various towing companies have delivered tows of barges loaded with coal to barge mooring areas in the old channel, and TVA has used TVA tugboats to move the barges to the unloader and then back to the mooring areas for pickup by the towing companies.

The Patricia H is one of the TVA tugboats used to move barges at CFP. At the time of the accident, it was worth $420,000.

The TVA is aware that the old channel is used for recreational fishing by various types and sizes of boats. At approximately 5:30 p.m. on June 5, 2005, Third-Party Defendant/Counter-Plaintiff-Appellee Thomas Lawrence went fishing with his cousin, Matheny, in Lawrence's fourteen foot Phantom fiberglass boat in the old channel of the Cumberland River near CFP. Lawrence had fished there numerous times before.

At 7:00 p.m., Captain Ralls and his crew started their shift on the Patricia H. Shortly after 7:00 p.m., Captain Ralls piloted the Patricia H from the unloader downstream to pick up a loaded coal barge. As the Patricia H traveled from the unloader downstream "lightboat" (without a barge), it passed the Phantom boat without incident. As the Patricia H traveled back upstream to the unloader with a loaded barge, it passed the Phantom boat again without incident. However, at approximately 7:50 p.m., when the Patricia H came back downstream again to obtain another loaded barge, its wake swamped the Phantom boat. Both men were thrown overboard. The crew of the Patricia H were able to save Lawrence, but Matheny drowned.

Captain Ralls's immediate supervisor was David Duke, the coal haul foreman at CFP. Duke was responsible for ensuring that CFP employees obeyed safety rules. 523 F.Supp.2d at 710. Duke testified that TVA has no yearly training program specifically for tugboat operators, that "TVA does not train the pilots in the 'Rules of the Road' except through informal 'on river' training," and that "there was no specific policy regarding the speed of tugboats, but that there was an expectation that the tugboats would be operated as slowly as possible around fishing boats." *Id.* Duke also testified that he was not aware of any prior incidents concerning Captain Ralls. *Id.* at 711.

Matheny was 49 years old when he died. Matheny suffered from coronary artery atherosclerosis and had a heart attack on September 27, 2004. 523

F.Supp.2d at 728. He had a life expectancy of eight years. 247 F.R.D. at 543. He was not employed at the time of his death, but acted as primary caretaker for his granddaughter. He was drawing a disability pension from the Tennessee Department of Corrections and had applied for disability benefits from the Social Security Administration.

Mr. and Mrs. Matheny had been married since 1974 and lived for many years in middle Tennessee. The couple had three adult children – Elan (31 years old at the time of trial), Christina (29 years old at the time of trial), and Stephanie (25 years old at the time of trial). One of Christina's children, Chloe, lived with Mr. and Mrs. Matheny, and they provided for her care. The district court found that Matheny had "a very close relationship with his children and his wife." 523 F.Supp.2d at 730.

B. The District Court's Ruling

The district court found that Captain Ralls was an experienced tugboat captain,[1] and that he "proved

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[1] The district court found that Captain Ralls has a first class pilot license as well as a tow-operator license and has had safety training in conjunction with obtaining these licenses. In addition, Captain Ralls has earned endorsements to his licenses, allowing him to work on the deck of a boat, to use the radio, and to observe radar. Captain Ralls has been tested on the "Rules of the Road" portion of the Inland Rules of Navigation by the Coast Guard, specifically regarding passing, crossing situations, risk of

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himself, up to the time of the accident, to be a perfectly competent captain." *Id.* at 722. However, the district court also found, and TVA concedes, "that Captain Ralls violated Rules 2(b) and 6 of the Inland Rules of Navigation by operating the Patricia H at an excessive speed when it passed the fishing boat," *id.* at 714, and "that Captain Ralls's creation of an excessive wake was 100% responsible for the capsize of the fishing boat and the death of Mr. Matheny." *Id.* at 712.

The district court held that the Limitation Act did not apply to limit TVA's liability to the value of the Patricia H ($420,000) "because TVA had privity or knowledge of the risks posed by Captain Ralls['s] negligent operation of the Patricia H at an excessive speed." *Id.* at 721. "As a separate basis for liability" without limitation, the district court found that TVA negligently supervised Captain Ralls, "by failing to specifically instruct him to maintain a low speed or a low wake in the presence of small fishing vessels." *Id.* at 725. On the other hand, the district court found that TVA did not commit negligent entrustment: "Although the court finds that Captain Ralls was

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> collision, safety, and good seamanship. He has been trained in collision avoidance and considers the wake of his boat hitting another boat to be a collision. He has worked at several TVA harbors and has no prior citations or investigations regarding his performance.

523 F.Supp.2d at 523.

negligent in this specific instance, it finds no basis to question his overall competency as a tugboat captain. Accordingly, TVA did not commit negligent entrustment." *Id.* at 726.

The district court awarded Becky Matheny, as surviving spouse of Matheny, a total of $3,324,352, which represented $124,352 for lost future earnings and household services, and $3.2 million for consortium losses of Mrs. Matheny and Matheny's three adult children. *See* 247 F.R.D. at 543. The $124,352 figure represented the present value of Mr. Matheny's disability pension assuming a life expectancy of eight years, or $45,861, and the present value of his household services for eight years, or $78,491. *Id.* The $3.2 million represented $100,000 a year times eight years for each of his four family members. *Id.*

Thomas Lawrence and his wife were awarded a total of $238,685 based on Lawrence's injuries. *See* 523 F.Supp.2d at 730.

II. Analysis

Factual findings from a bench trial are reviewed for clear error. *In re Cleveland Tankers,* 67 F.3d 1200, 1205 (6th Cir.1995); Fed.R.Civ.P. 52(a)(6). Questions of law are reviewed de novo. *Pearce v. United States,* 261 F.3d 643, 647 (6th Cir.2001).

A. Limitation of Liability

The Limitation of Liability Act states in relevant part as follows: "[T]he liability of the owner of a vessel for any claim . . . or liability described in subsection (b) shall not exceed the value of the vessel and pending freight." 46 U.S.C.A. § 30505(a) (West 2007).[2] Subsection (b) states in relevant part that "claims . . . and liabilities subject to limitation under subsection (a) are those arising from . . . any loss, damage, or injury by collision, or any act . . . done, occasioned, or incurred, without the privity or knowledge of the owner." *Id.* § 30505(b); *see Kellogg & Sons v. Hicks (The Linseed King),* 285 U.S. 502, 510, 52 S.Ct. 450, 76 L.Ed. 903 (1932). The Act "alters the normal rules of vicarious liability" by limiting the ship owner's liability for any injuries caused by the negligence of the captain or crew to the value of the ship unless the owner himself had "privity or knowledge" of the negligent acts. *In re City of New York,* 522 F.3d 279, 283 (2d Cir.2008) (internal citations omitted).

Limitation of liability involves two inquiries: (1) negligence or unseaworthiness, and (2) knowledge or privity of the vessel owner. *See In re Muer,* 146 F.3d 410, 415 (6th Cir.1998); *Cleveland Tankers,* 67 F.3d at 1203. The burden of proving negligence is on the claimant; the burden of proving lack of privity or

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[2] The Limitation Act was amended and codified on October 6, 2006. The amendments made no substantive change to the law. *See* 46 App. U.S.C. § 183(a) (2000).

knowledge of the negligence is on the owner. *Muer,* 146 F.3d at 416; *Cleveland Tankers,* 67 F.3d at 1203.

TVA concedes on appeal that it is liable for Captain Ralls's negligence, but claims that it is entitled to limitation of liability because it had no privity or knowledge of Ralls's negligent act. Thus, the only issue is whether TVA had privity or knowledge of Ralls's negligent act. In answering this question, we are mindful that "[t]he shipowner's privity or knowledge is not measured against every fact or act regarding the accident; rather, privity or knowledge is measured against the specific negligent acts or unseaworthy conditions that actually caused or contributed to the accident." *Suzuki of Orange Park, Inc. v. Shubert,* 86 F.3d 1060, 1064 (11th Cir.1996). Further, when the owner of a vessel is a corporation or government entity, the owner is charged with privity or knowledge of an officer, manager, or superintendent who has authority over the scope of activities out of which the liability occurred. *Coryell v. Phipps,* 317 U.S. 406, 410, 63 S.Ct. 291, 87 L.Ed. 363 (1943); *In re City of New York,* 522 F.3d at 293; *In re Kristie Leigh Enters.,* 72 F.3d 479, 481 (5th Cir.1996).

The district court held that the Limitation Act did not apply "because TVA had knowledge of the *risks* posed by Captain Ralls's negligent operation of the Patricia H at an excessive speed." 523 F.Supp.2d at 721 (emphasis added); *see also id.* at 722 (framing the "the relevant inquiry [as] whether the defendant had privity or knowledge of the risks posed by tugboats being operated too fast, creating potentially

dangerous wakes for nearby fishing boats"). Thus, according to the district court, because TVA was aware of the fact that *if* a tugboat operates at an excessive speed it *may* create a dangerous wake for nearby recreational boats, and TVA did not tell Captain Ralls that, TVA is fully liable.

The district court misreads the Limitation of Liability Act, which speaks in terms of *acts,* not *risks.* As TVA points out, it is indisputable that all vessel owners know that if a competent captain commits a negligent act, there is a risk of harm. Instead, the Limitation of Liability Act focuses on "the specific negligent acts or unseaworthy conditions that actually caused or contributed to the accident," *Suzuki,* 86 F.3d at 1064, and limits liability unless the owner has privity or knowledge of the specific act.

There is no evidence in this record to justify imputing knowledge to TVA about the specific conditions that led to the accident. TVA barges and fishing boats have peacefully coexisted for years in the area in which the drowning occurred. Lawrence and his friend James Stanley testified that the harbor is considered a safe place in which to fish, that they have fished there on hundreds of occasions without incident, and that they have continued to fish in the same area where the accident occurred even after Matheny's death. Although Stanley mentioned that on two occasions he saw wakes cause spillovers into fishing boats, two isolated incidents involving wakes causing spillovers into fishing boats do not impart knowledge to TVA about a dangerous condition. Thus,

TVA was justified in assuming that the area was safe for both barges and fishing boats.

Furthermore, it is well-settled that under the Limitation of Liability Act, "an owner may rely on the navigational expertise of a competent ship's master." *Kristie Leigh,* 72 F.3d at 482. Here, the district court found that "Captain Ralls had proved himself, up to the time of the accident, to be a perfectly competent captain." 523 F.Supp.2d at 722. The district court also found Captain Ralls had been tested on the "Rules of the Road" aspect of the Inland Rules of Navigation by the Coast Guard, had been trained in collision avoidance and considered the wake of his boat hitting another boat a collision. *Id.* at 710.[3] Captain Ralls

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[3] The Inland Navigational Rules are statutory rules that "apply to all vessels upon the inland waters of the United States." 33 U.S.C.A. § 2001 (West 2001 and 2008 Supp.). Inland Rule 2 ("Responsibility") is codified at 33 U.S.C.A. § 2002 and provides in relevant part that "[i]n construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved." Inland Rule 6, codified at 33 U.S.C.A. § 2006, provides in pertinent part that "[e]very vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions." Rule 6 further provides that "[i]n determining a safe speed," factors to be considered include "the state of visibility" and "the traffic density including concentration of fishing vessels or any other vessels." 33 U.S.C.A. § 2006(a)(i), (ii). The term "collision" is used in a broad sense under the Inland Navigational Rules to include a vessel's wake striking another vessel. *Bernert Towboat Co. v. USS Chandler,* 666 F.Supp. 1454, 1457 (D.Or.1987). Captain Ralls had been trained in these rules and

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had no prior citations. *Id.* The court went so far as to add that "at the time of the accident, Captain Ralls appears to have been the most qualified tugboat captain that TVA employed." *Id.* at 726. A competent captain conversant in the Inland Rules of Navigation did not need to be told that an excessive wake would be dangerous to small fishing boats. TVA was entitled to rely on a competent captain's navigational knowledge and cannot be deemed negligent because it failed to inform Captain Ralls or any of its other captains not to be negligent by creating excessive wakes near recreational boats.

A Sixth Circuit case, *The Longfellow,* 104 F. 360 (6th Cir.1900), is dispositive. The Longfellow was a passenger boat on the Ohio River. While departing the port of Cincinnati, the pilot allowed the Longfellow to become positioned in the river such that she was headed for the center pier of a railroad bridge, despite the assistance of a tugboat, the Hercules Carroll. *Id.* at 362. The pilot and captain were unable to avoid a collision, and the Longfellow struck the center pier of the railroad bridge. The boat immediately

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considered the wake of his boat hitting another boat a collision. 523 F.Supp.2d at 710.

These Inland Rules of Navigation supply the "Rules of the Road" governing navigation on inland waters. *See Turecamo Maritime, Inc. v. Weeks Dredge No. 516,* 872 F.Supp. 1215, 1229 (S.D.N.Y.1994) ("The Inland Navigation Rules encompass long-standing steering and sailing rules and principles, otherwise known as 'Rules of the Road', which govern navigation on inland waters.")

sank, and several lives and most of the cargo were lost. *Id.* The district court found liability in the amount of $60,000, but held that Longfellow's corporate owners were not liable beyond the value of the wrecked vessel, appraised at $250. *Id.* This Court affirmed the district court's finding that the collision was "due to faults of navigation" which "were without the knowledge or privity of the owners, who were therefore exonerated from liability beyond the value of the wreck and freight." *Id.* at 364.

The Court explained:

> The faults which the trial judge found were clearly faults in the navigation of the Longfellow, and cannot be imputed to her owners, as having occurred through their "privity or knowledge." If we assume that there was no positive prearrangement between the officers of the Longfellow and the Hercules Carrol as would secure the best cooperative results, it was the fault of those navigating those boats, and not of the owners of the Longfellow. . . . The navigation of the Longfellow was under the sole control and direction of her pilot, who was a licensed pilot of unquestionable reputation and skill. It was for him to direct how the Hercules Carrol should assist, and the latter was subject to his orders and direction so far as the actual navigation of the Longfellow was affected. . . . The navigation of the towboat when lashed alongside of the Longfellow was necessarily to be governed by the navigation of the latter, and it was for the pilot to give

> such special orders as his judgment and the circumstances dictated. Neither was it the personal fault of the owners that the navigators of the Longfellow did not stop and back [up] when smoke first obscured her pilot's view. If there was fault, it was a fault of those controlling her navigation, and was without the knowledge or privity of the owners.

Id. Similarly, in this case, Captain Ralls was a skilled pilot, who should have exercised his judgment to slow down while passing the fishing boat in the channel. The accident was caused by Captain Ralls's navigational decisions.

Other cases support the conclusion that Ralls's errors were mistakes of navigation, which do not justify denying limitation of liability. For example, in *In re Omega Protein, Inc.*, 548 F.3d 361 (5th Cir.2008), a 396-ton fishing vessel struck an oil platform at night. The captain, acting as a helmsman, had turned the wheelhouse lights on to examine a broken refrigerator part, and the mirror effect of the wheelhouse lights prevented him from seeing out the windows or using the radar. *Id.* at 373. The Fifth Circuit affirmed the lower court's ruling that the captain's errors were mistakes of navigation by a competent captain not within the privity or knowledge of the vessel owner for limitation purposes. *Id.* at 374. The court pointed out that there was no pattern of improper or unsafe behavior by the captain, a twenty-year veteran with a "spotless" record. *Id.* at 373. The Fifth Circuit

rejected the argument that the owner did not provide sufficient training and supervision of the captain as to when he should use the radar's anti-collision alarm system because mistakes in navigation caused the accident. *Id.* Significantly, the Fifth Circuit concluded that while the plaintiff had demonstrated that the corporate owner did not do everything it could have done to ensure that the pilot knew the full capabilities of the boat's radar, or have a protocol in place, "the privity or knowledge standard does not require a vessel owner to take every possible precaution; it only obliges the owner to select a competent master and remedy deficiencies which he can discover through reasonable diligence." *Id.* at 374.

Also illustrative is *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir.1967). There, five lives on the fishing vessel B & G were lost when a Coast Guard patrol boat (the "95") towed the B & G onto a shoal in bad weather. *Id.* at 191. The district court had denied limitation because it found both negligent navigation by the 95's commanding officer, Lieutenant Junior Grade McManus, and deficiencies in the 95's equipment, which were known to Commander Waters, the officer in charge of the Coast Guard Rescue Coordination Center that dispatched the 95, and a managing officer of the government for limitation of liability purposes. *Id.* at 191-92, 198-99. The First Circuit reversed the limitation holding, finding that the equipment deficiencies were not the cause of the loss, *id.* at 198, but that the loss was caused by "the impropriety of the conduct of

McManus, as captain, in navigating the vessel." *Id.* at 199. The court further concluded that "[i]t is against this very liability that the right to limit exists." *Id.*

The district court's reliance on *The Linseed King,* 285 U.S. 502, 52 S.Ct. 450, 76 L.Ed. 903, is misplaced. The Linseed King was a ferry boat used to ferry workers from the foot of Ninety-Sixth Street in New York City across the Hudson River to the owner's linseed oil factory on the west shore of the river at Edgewater, New Jersey. *Id.* at 506, 52 S.Ct. 450. On an early morning trip across the river, the ferry struck an ice floe and sank in two minutes. *Id.* at 507, 52 S.Ct. 450. Over thirty-five people died. *Id.* The Supreme Court found privity or knowledge and denied limitation of liability because "[t]he Linseed King was admittedly unfit to run through ice." *Id.* at 510, 52 S.Ct. 450. More importantly, this fact was known to the owner's executive officers, who had instructed the Edgewater plant manager, Stover, "that the boat should never be run through ice, and that as soon as ice showed itself in the river she was to be laid up for the winter." *Id.* Stover had also been "directed that whenever there was a likelihood of the presence of ice all trips were to be made only in broad daylight, and even these were to be discontinued when ice definitely appeared." *Id.* "The decision as to when the ferry should be withdrawn for the winter rested with him," and ice had been observed in the river some days prior to the accident. *Id.*

The Supreme Court agreed with the lower courts that "Stover's position as the works manager of the

Edgewater plant and the scope of his authority render his privity or knowledge that of the company," and that "[t]he owner was therefore chargeable with negligence in not taking measures for the safety of the passengers which the weather conditions required." *Id.* at 511, 52 S.Ct. 450. The Supreme Court rejected an argument that the owner was not liable because he had a competent master who had been instructed not to run through ice, and that once he encountered it, it became his duty to abandon the trip such that the owner did not have privity. *Id.*

> But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone. In these there is no opportunity for consultation or cooperation or of bringing the proposed action of the master to the owner's knowledge. *The latter must rely upon the master's obeying the rules and using reasonable judgment.* The conditions on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was his, and therefore with the owner's privity or knowledge.

Id. at 511-512, 52 S.Ct. 450 (emphasis added).

The Linseed King is not analogous because the Patricia H was not unseaworthy and there were no weather conditions to alert Duke or anyone else that special care needed to be taken. Rather, the accident here occurred because Ralls did not obey the rules of navigation or use reasonable judgment, let alone common sense, during a fairly routine occurrence in the harbor – the presence of small fishing boats. Duke had no way of anticipating that Ralls would not do so in this instance.[4]

Also distinguishable are cases where the owners knew of unseaworthiness or crew incompetence prior to the accident at issue. *See, e.g. Trico Marine Assets, Inc. v. Diamond B Marine Servs., Inc.*, 332 F.3d 779, 790 (5th Cir.2003) (finding no limitation of liability where captain misread his radar and attempted to conduct an improper passing maneuver leading to a collision because the captain had no training in how to use the radar and had not otherwise received safety training, and the vessel owner had not evaluated the vessel's seaworthiness or the captain's qualifications, and knew that the captain had previously operated the vessel in the fog but did nothing about it); *Hercules Carriers, Inc. v. Claimant of State of Fla.*, 768 F.2d 1558, 1576-77 (11th Cir.1985) (limitation did not apply where the evidence showed that

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[4] Although Matheny alleged that the Patricia H was deficiently equipped and thus unseaworthy, the district court found that the accident was not caused by any equipment deficiencies. 523 F.Supp.2d at 713 n. 4.

the collision occurred because the company had unwritten policies of putting the pilot rather than the master in command and of instructing its crews not to countermand the actions of the pilot, demonstrating the owner's knowledge and privity as to the crew's negligence and unseaworthiness; further, the owner should have known that the crew was not properly licensed).

In short, the accident was caused by Captain Ralls's navigational decisions as captain of his ship and his acts cannot be imputed to TVA because there is no evidence that TVA had privity or knowledge of the acts that led to the injuries here.

B. Negligent Supervision

TVA also challenges the district court's conclusion that it is not entitled to limitation of liability because of "negligent supervision" of Captain Ralls. Although the Inland Navigation Rules 2(b) and 6 impose a legal duty to maintain an appropriate speed, there is no legal duty on a vessel owner to specifically instruct a licensed captain to follow them prior to a voyage. *See In re MO Barge Lines, Inc.*, 360 F.3d 885, 891 (8th Cir.2004) (holding that owner was entitled to limitation even though the owner "failed to explicitly advise [the pilot] that he was required to follow the [Inland Navigational] Rules" where the record established that pilot was a licensed, competent operator, who had been accident free for seven years and had complied with the Rules). Rather, "[t]he owner's duty

is essentially satisfied when he properly equips the vessel and selects competent crew to operate it." *Id.* In other words, "for limitation purposes, an owner may rely on the navigational expertise of a competent ship master." *Kristie Leigh,* 72 F.3d at 482. *See also Omega Protein,* 548 F.3d at 374 (stating that the "privity or knowledge" rule "does not require a vessel owner to take every possible precaution; it only obliges the owner to select a competent master and remedy deficiencies which he can discover through reasonable diligence"); *In re Am. Milling Co.,* 409 F.3d 1005, 1020 (8th Cir.2005) (affirming limitation of liability against argument that owner failed to adequately train the captain and to educate him about currents in the river, noting that the "argument rest[ed] entirely on the presumption that [the pilot] was incompetent and that the pilot did not, as the district court found, commit a spontaneous navigational error").

Here, TVA did just that: it relied on the navigational expertise of an experienced competent operator with knowledge of the "Rules of the Road." There was no duty on TVA to remind Captain Ralls to follow those rules. Therefore, the district court erred in holding that TVA negligently supervised Ralls by failing to instruct him not to operate the Patricia H at an excessive speed around small fishing boats.

TVA also asserts that the discretionary function doctrine precludes liability based on the alleged negligent supervision of federal employees. Because TVA

is a "'wholly-owned corporate agency and instrumentality of the United States,'" *Edwards v. Tenn. Valley Auth.*, 255 F.3d 318, 322-23 (6th Cir.2001) (quoting *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1333 (6th Cir.1995)), the doctrine potentially applies here. *See id.* However, given our conclusion that the facts do not support a negligent supervision claim in this case, we need not address this question.

C. Consortium Damages

Both parties agree that damages based on loss of consortium are permissible in this admiralty case because Tennessee's wrongful death statute, Tenn.Code Ann. § 20-5-113 (1994 & Supp.2006), allows for recovery of the pecuniary value of the decedent's life, which includes not only lost earning capacity but also the value of tangible household services lost and the value of intangible consortium losses sustained by a decedent's spouse and children. *See Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 601-02 (Tenn.1999).[5] TVA does not contest the district court's findings and awards regarding the value of Mr. Matheny's lost future earnings and tangible household services but takes issue with the loss of consortium award. Because we are reversing

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[5] The Tennessee Supreme Court also held that "consortium-type damages may be considered when calculating the pecuniary value of a deceased's life . . . [and do] not create a new cause of action but merely refines the term 'pecuniary value.'" *Jordan*, 984 S.W.2d at 601.

and remanding with instructions to the district court to apply the limitation of liability under 46 U.S.C. § 30505, we leave it to the district court to apportion liability between the Lawrences and Becky Matheny.

III. Conclusion

For the foregoing reasons, the judgment of the district court is **REVERSED** in part and the case **REMANDED** for further proceedings consistent with this opinion.

523 F.Supp.2d 697

Becky MATHENY, individually and as Surviving Spouse of Ronald Matheny, Deceased, Plaintiff,

v.

The TENNESSEE VALLEY AUTHORITY, Defendant/Third-Party Plaintiff/Counter-Defendant.

v.

Thomas Lawrence and Johnna Lawrence, Third-Party Defendant/Counter-Plaintiff and Counter-Plaintiff.

No. 3:06-0565.

United States District Court,
M.D. Tennessee,
Nashville Division.

Dec. 6, 2007.

Jonathan R. Perry, The Perry Firm, Franklin, TN, Kristen V. Dyer, Philip Norman Elbert, Neal & Harwell, Nashville, TN, for Plaintiff.

Thomas A. Robins, Edwin W. Small, Jared E. Mitchem, Tennessee Valley Authority, Knoxville, TN, Maureen H. Dunn, Office of the General Counsel Tennessee Valley Authority, Knoxville, TN, for Defendants.

Mark M. Mizell, Franklin, TN, for Counter Plaintiff.

MEMORANDUM

ALETA A. TRAUGER, District Judge.

A bench trial was held on claims for negligence, negligent supervision and entrustment, and loss of consortium arising from a boating accident that occurred on the Cumberland River. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the court enters judgment for the plaintiff and for the counter-plaintiffs and sets forth herein its findings of fact and conclusions of law.

BACKGROUND

The plaintiff, Becky Matheny, is the widow of Ronald Matheny, who drowned on June 5, 2005, when a small boat in which he was fishing capsized in the Cumberland River.[1] Third-party defendant and counter-plaintiff Thomas "Steve" Lawrence, Mr. Matheny's cousin, was the owner and pilot of the fishing boat in question. The fishing boat capsized when it was swamped by the wake of a tug boat, The Patricia H., owned by defendant Tennessee Valley Authority ("TVA") and operated by pilot Jeff Ralls, a TVA employee. Mr. Lawrence was successfully rescued by pilot Ralls and his crew. Mr. Matheny, however, drowned before he could be rescued.

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[1] The court relies on the facts established at the bench trial, which took place on November 6, 2007 through November 9, 2007. Because neither party ordered an official transcript, citations to specific testimony are not included herein.

I. Pre-Collision Events

Mr. Lawrence and Mr. Matheny decided, on the spur of the moment, to go fishing in the Cumberland River at approximately 2:30 p.m. on June 5, 2005, a Sunday. The two men habitually fished for catfish in the area of the Cumberland River abutting the Cumberland City Steam Plant, in Cumberland City, Tennessee, because very large catfish can be found in that area. TVA operates the Cumberland City Steam Plant and, pursuant to its operation, floats coal barges on the banks of the river and uses tugboats to push the barges to different locations on the banks and on the island situated in the middle of the river. In addition, a private company, Ingram Barge Co., utilizes towboat fleets to move large groups of coal barges down-river to the plant.

Mr. Lawrence and Mr. Matheny planned to fish in the Cumberland River until approximately midnight or 1:00 a.m. They loaded two coolers into the boat – one of which contained a twelve-pack of Mountain Dew and the other, empty and intended for storing the fish that were caught – and drove to the Cumberland Plant, which had a dock that was open to the public. Mr. Lawrence's boat, which he had purchased used approximately one year earlier, was a 1981 Phantom. The Phantom fishing boat was constructed of fiberglass and measured 14 feet, 10 inches in length. The boat had a freeboard – that is, the distance from the waterline to the uppermost portion of the side of the boat, when the boat is set in water – of roughly 1 to 1.5 feet when moored. When

moving, it rode high in the water, such that it had a freeboard of 2 to 2.5 feet. Mr. Lawrence spent a significant amount of time fishing in this boat at the Cumberland Plant and at other areas known to attract large catfish, and he had taken his children and mother out in the boat without incident.

The engine was in good working condition. In addition, the boat contained a fully operational bilge pump and a trolling motor with a weak battery. The trolling motor was not used on the day in question. The boat contained no food or alcohol. Mr. Lawrence had two good-quality life vests as well as two poor-quality ones. The poor-quality life vests were sometimes tied to the boat to serve as bumpers.

The Cumberland Plant was roughly forty minutes away from Mr. Lawrence's home, and the two men arrived at their destination at 5:30 p.m. When they embarked onto the river, Mr. Lawrence sat at the back of the boat near the steering wheel, and Mr. Matheny sat at the front of the boat on a seat situated on the upper deck. This was not a pedestal seat but one that was situated flush against the deck, with Mr. Matheny's feet resting on the lower deck. Because it was flush against the upper deck, Mr. Matheny's seat was higher than Mr. Lawrence's; however, it did not extend above the top edges of the sides of the boat. The life vests were on the deck and in reach of the two men.

The two men fished in the lower channel between the islands and the steam plant. This channel is 400

feet wide. Conditions on the river were very mild. There was little wind and little current. The Phantom boat did not encounter any other fishing vessels, though fishing is common in the channel. Mr. Lawrence and Mr. Matheny tied off the boat to the skimmer wall, which is located close to the riverbank, just upstream from a group of six barges. The barges were 200 feet long and 35 feet wide. After a period of time, another set of eight barges were moved into place just upstream from the boat by a private tug operated by Ingram Barge Co. Mr. Lawrence alleged at trial that, at this time, he moved the boat downstream to the group of six barges, and tied the boat off to the outside of one of the barges. Subsequently, Mr. Lawrence and Mr. Matheny decided to move the boat a second time to a location nearer to the islands. Moving away from the barges, the two men saw the Patricia H. for the first time, creating a high wake.

Captain Ralls is a licensed pilot, having worked for TVA for 7 years and for Ingram Barge Co. before that. He worked the 12-hour night shift, operating the Patricia H., a highly maneuverable flat-front tugboat. The Patricia H. weighs 95 tons when loaded with fuel and gear. The boat has two engines, each with 500 horsepower. The registered dimensions of the boat are 52.5 feet x 22 feet x 8 feet. The tower of the boat is 25 to 30 feet above the deck and the deck is 7.5 feet above the water. The boat creates a wake at a 45 degree angle and also creates turbulence from the prop engines.

The Patricia H. does not contain a working RPM gauge or any other instrument that allows the pilot to determine how fast he is going. Instead, the pilot and crew estimate the speed by noting the mile markers. The terminology used by the crew for speed is "slow walk," "medium walk," and "fast walk." The crew – on the day in question, Craig Welker and Dwayne Van Zant – report the speed to the captain from the deck. However, the crew only stands on the deck when the boat is pushing a barge. When the boat is traveling without a barge, or "light boat," the crew remains inside the cabin, and Captain Ralls estimates the speed himself by referring to the mile markers and listening to the engines.

Captain Ralls' job is to push loaded coal barges to the unloader and then to move the empty barges back to a position adjacent to the island, from which they are eventually sent to be re-filled with coal. On June 5, 2005, Captain Ralls arrived at the plant at 7:00 p.m., spent fifteen minutes getting pre-job instruction from the coal tower foreman, then met with his crew. Soon thereafter, at roughly 7:25, Captain Ralls, Mr. Welker and Mr. Van Zant had boarded the tugboat and set upon the evening's work.

First, the Patricia H. traveled downstream to the group of six barges, next to which, against the skimmer wall, Mr. Lawrence had moored his boat. During this trip, Captain Ralls saw the fishing boat tied against the skimmer wall, between the two groups of barges. Mr. Van Zant also saw the boat in this location.

During this first trip, the Patricia H. passed the location of the fishing boat without incident. The Patricia H. pushed one of the barges – specifically, the barge on the outside corner, farthest from the fishing boat – from this group of six to the unloader, which was upstream. Captain Ralls testified that it takes approximately fifteen minutes to go and get a barge, bring it to the unloading area, and move another empty barge away from the unloader. The crew of the Patricia H. performed this function, taking an empty barge to the group of barges across the channel, next to the island, and then made a second trip to the downstream group of barges, passing the fishing boat a second time. The Patricia H. was headed towards the barge on the outside, upstream corner of the group, closest to where the fishing boat had been located on the first trip.

Captain Ralls testified that, during this second trip, once again, he saw the fishing boat. Once again, the fishing boat was located in between the two groups of barges. However, the boat had untied from the wall and was moving out of this make-shift harbor, towards the open part of the channel. Captain Ralls testified that the boat turned, facing upstream, and that he watched the boat as it cleared his stern. Some time after he passed the boat, Captain Ralls heard the screams of the men in the water and, at that time, realized that the fishing boat had capsized.

II. The Accident

Mr. Lawrence's boat capsized when it encountered the wake of the Patricia H. on the tug boat's second trip downstream. There were no other boats in the area and no other conditions existed that could have caused the fishing boat to capsize. Likewise, the evidence at trial does not support a finding that the accident was caused in any way by a defect in the fishing boat itself. Although the precise speed of the Patricia H. and the size of the wake – at best, estimated by the parties at the time of the accident – cannot be determined, it can be determined – and the court so finds – that the wake was large enough to cause Mr. Lawrence's fishing boat to capsize and to throw Mr. Lawrence and Mr. Matheny into the water.

A. The Position of the Boats

Mr. Lawrence testified that, when he first saw the Patricia H., he was on the outside of the group of six barges, downstream from his original location against the skimmer wall. As the Patricia H. approached, he saw that it was running at a high speed and surmised, from the noise coming from the boat, that both engines were running wide open. He changed directions, attempting to outrun the boat by going downstream, but saw that he was hemmed in between the wake and the upstream set of barges, and so turned again – completing a 360 degree turn – to face the wake and ride over it. He passed over the first wave, with some water entering the boat;

however, by the time the second wave hit the boat, its front portion was under water. The second wave sank the boat. Mr. Lawrence and Mr. Matheny found themselves in the Cumberland River, screaming for help.

Captain Ralls testified that, on both trips, the fishing boat was located within the harbor created by the two sets of barges – eight barges upstream and six barges downstream – but that on the second trip it was moving out of this area, towards the path of the Patricia H., when he first saw it. The fishing boat was 45 degrees from the shoreline, creeping forward at a very low speed. Captain Ralls testified that, although he can stop the tug boat very fast by reversing the engines, he did not do so. He did testify, however, that he slowed down upon encountering the fishing boat, when he was still 25 feet from the upstream edge of the downstream barges. Captain Ralls' crew, on the other hand, testified that he slowed down only when he came to the downstream barges, approximately 600 yards past the area of the capsize. According to Captain Ralls, the fishing boat turned upstream, traveling in the opposite direction of the tug boat. He watched the boat clear his bow and then turned to face the approaching group of barges. Captain Ralls did not see the boat capsize, nor did any of his crew.

From this conflicting testimony, it is far from clear exactly where the fishing boat was located when it interacted with the wake of the Patricia H. However, in either case, it is clear that the boat was in a position such that it could not escape the effect of the

wake. In fact, the placement of the boat in the small harbor created by the two sets of barges – in accordance with Captain Ralls' testimony – would lead great credence to Mr. Lawrence's testimony that he could not outrun the wake because there was no room between the wake and a set of barges.

In any case, Mr. Lawrence testified that he did not see the Patricia H. until its second pass towards the set of downstream barges, at which time the wake could not be avoided. No evidence contradicts that testimony. Even if the court were to find that, during both trips, the fishing boat was located between the two sets of barges, that would still comport with Mr. Lawrence's testimony that he first saw the Patricia H. only seconds before the capsize. When the Patricia H. passed for the first time, the boat was tied to the skimmer wall, and it is perfectly consistent for Mr. Lawrence not to have noticed the Patricia H. at that time.

The location of the Patricia H., too, is an important factor. On the first trip, the Patricia H. was traveling to the barge farthest downstream among the group of six barges. On the second trip, the Patricia H. was traveling to the farthest upstream barge in that group. This difference would have created a different, narrower angle of approach for the Patricia H. In short, apart from the fact that the fishing boat was moving away from the skimmer wall and towards the Patricia H. when it encountered the wake, the Patricia H. also would have been closer to the skimmer wall between the two sets of barges, due

to this change in destination. Accordingly – apart from a change in speed of the tugboat – it is quite possible that the Patricia H.'s wake would not have been noticeable to Mr. Lawrence when it first passed, even if his boat traveled only a very small distance in the intervening time. Regardless of where, exactly, the fishing boat was positioned at the time of the accident, it was in a position such that the wake caused by the passing tug created a hazard that Mr. Lawrence could not overcome.

B. The Speed of the Tug

The court finds that the Patricia H. was capable of traveling at a high enough speed to create an unsafe wake for fishing boats and that, in this instance, it was doing so. Mr. Lawrence estimated that the Patricia H. was traveling 20 miles per hour when he first saw it approaching him; however, the defendant's expert witness, Arthur Sargent, testified that the Patricia H. is not capable of that speed. Nonetheless, the Patricia H. did not need to be moving at 20 miles per hour in order to be going too fast under the circumstances.

The court does not find Mr. Sargent's opinion regarding the exact speed of the Patricia H. to be very compelling. Mr. Sargent testified that the Patricia H. could not have been going faster than 7 miles per hour because, if it were to go faster, it would create a large enough wake to splash water onto its own deck. Mr. Sargent also testified that, at the 7 miles per

hour speed, the wave created by the wake would only be .75 feet tall at a distance of 50 feet away from the boat which, according to Mr. Sargent, would not cause any danger to a small fishing boat such as Mr. Lawrence's Phantom. Although the Patricia H.'s freeboard at its bow is not particularly high, it is considerably higher than the Phantom's freeboard, and it seems inconsistent that a wake that is almost high enough to swamp the Patricia H. itself would, simultaneously, pose no danger to a much smaller boat floating nearby.

Mr. Sargent came by his estimate of 7 miles per hour by riding in the Patricia H. with a GPS device and instructing a pilot to operate the tug until the water was just coming over the head-log of the boat. Captain Ralls agreed that the boat could only have been traveling "a few" miles per hour at the time of the incident, although both engines were engaged at that time. However, Captain Stoller, an expert witness for the plaintiff and a former tugboat captain, did not agree that the speed could be determined to have been 7 miles per hour or lower, or that, at 7 miles per hour, the Patricia H. would necessarily take on excessive water. Further, the deckhands were not on board during the time in question, but were inside the cabin and therefore do not know for certain whether or not any water splashed on the deck while the Patricia H. was in progress. Although the deckhands testified that they observed no water on deck when they came out of the cabin to aid in the rescue of the two men, it can hardly be imagined that the

deckhands made a thorough investigation of the deck's wetness, their attention being taxed by the sudden necessity of rescuing two men.

C. The Size of the Wake

Although the exact size of the wake created by the Patricia H. cannot be determined, the court finds that its wake was large enough to create a hazard to the fishing boat and that the wake did, in fact, cause the fishing boat to capsize. In particular, the court finds that the defendant's contention that the wake could not have exceeded .75 feet does not comport with the evidence presented at trial.

The defendant's expert, Mr. Sargent, testified that, in accordance with tests he performed two years after the accident occurred, the wave created by the wake of the Patricia H. could not have exceeded .75 feet at a distance of 50 feet away from the tugboat. However, Mr. Sargent's finding appears not to have been based on reliable test conditions and was contradicted by the testimony of other witnesses. First, Mr. Sargent measured the height of the wave from the island in the middle of the Cumberland River *after* having measured the speed of the Patricia H. as 7 miles *on a prior trip*. That is, Mr. Sargent first found the maximum speed of the Patricia H. to be 7 miles per hour – a finding which the court does not adopt – and, second, measured the wake of the tugboat from the shore of the island. On this second trip, Mr. Sargent kept his GPS device with him and instructed

the pilot of the tugboat to go at the same speed as he had been going before. However, the pilot did not have a GPS device to tell him that he was going 7 miles per hour on this second trip. Therefore, Mr. Sargent cannot say exactly what speed the tugboat was traveling when he took that measurement.

Further, Mr. Sargent's finding is contradicted by the testimony of several fact witnesses. Mr. Van Zant, a deckhand on the Patricia H., testified at trial that, at a medium walk, the Patricia H. would create a 1.5 foot wake and, at a fast walk, the tugboat would create a 2 foot wake. At his deposition, Mr. Van Zant testified that, at a regular speed, the Patricia H. would create a wake of 1.5 to 2 feet at a distance of 50 feet from the tugboat, and that pilots sometimes go faster, creating a larger wake. At trial, Mr. Van Zant testified that sometimes the tugboat traveled at a speed fast enough that water came up to the top edge of the ratchet box, which is located on the side of the Patricia H. and sits anywhere from 2.5 to 4 feet from the surface of the water, depending on the amount of fuel the tugboat is carrying. Obviously, at this speed, the wake would exceed 2 feet. Because Mr. Van Zant has extensive experience observing the wake and speed of this particular tugboat, the court finds his testimony on this point to be particularly convincing. Although, at his deposition, Captain Ralls testified that he could not estimate the size of the wake from his vantage point in the tower of the Patricia H., at trial, he estimated the size to be one foot, from its tallest point to its lowest point. Finally, Mr. Sargent's

finding is also contradicted by the testimony of Mr. Lawrence, who estimated the size of the wake to have been at least 3 feet.

In addition, Mr. Sargent testified that, although the size of the wave at a distance of 50 feet would initially have been .75 feet, it actually would have doubled to 1.5 feet after reflecting off the side of the skimmer wall. Accordingly, assuming that Mr. Sargent's findings are correct, the fishing boat would have been facing a 1.5 foot wave. If, in accordance with portions of Mr. Van Zant's testimony, the court were to find that the height of the wave was 1.5 to 2 feet high at a distance of 50 feet, then the actual size of the wave that the boat encountered would have been 3 to 4 feet.

The plaintiff's expert, Captain Stoller, testified that the speed of travel is very important in determining the estimation of wake size, and that even a slight increase or decrease in speed could significantly affect that determination. Unfortunately, Captain Ralls does not know exactly how fast he was going, and the speed of the vessel cannot be accurately reconstructed. However, what can be determined accurately is that the size of the wake was large enough to swamp Mr. Lawrence's boat. No other conditions have been identified that could have contributed to the fishing boat's capsize. The wake was large enough such that, in his position, Mr. Lawrence could not avert the accident by either outrunning the wake or turning to face it. The testimony at trial, taken as a whole, is certainly consistent with

a wake size large enough to overwhelm the small fishing boat. Accordingly, the court finds that Mr. Lawrence's fishing boat was overwhelmed by the Patricia H.'s excessive wake.

III. Post-Collision Events

Captain Ralls had steered the Patricia H. to a resting spot perpendicular to the coal barge on the upstream corner of the group of six barges, with his cabin door open, when he first heard the men screaming. He did not hear the screams earlier, even though he had been closer to the point of the accident. This is because, in his resting spot, the cabin's open door directly faced the location of the men. Captain Ralls turned the tug around and summoned the deckhands via radio to come out on the deck to aid in the rescue. Captain Ralls did not sound the man-overboard horn. He testified that the only purpose of this horn is to signal to the deckhands that there is a man overboard and, therefore, it was unnecessary to use it, having already used the radio for this purpose. They were 65 to 70 feet from the skimmer wall and approximately 600 yards away from the men in the water. Captain Ralls alerted the coal tower about the accident and told them to call 911.

As the Patricia H. closed in to a distance of approximately 75 feet away from Mr. Lawrence and Mr. Matheny, the two fisherman first came into view. When the tugboat was within 30 feet of Mr. Lawrence and Mr. Matheny, approximately 4 minutes after

Captain Ralls had set course towards the two men, the deckhands began throwing life rings to them. Rope had previously been tied to the life rings such that, if the men were to catch the rings, they could be hauled onto the boat. However, the men were unable to grab hold of the life rings.

The Patricia H. continued to close the gap between itself and the two men. Mr. Lawrence and Mr. Matheny were roughly 10 to 15 feet apart. Mr. Lawrence was holding onto a large cooler. Mr. Matheny was trying to swim, struggling to stay above water. The deckhands continued throwing the life rings. At first, Mr. Van Zant concentrated his efforts on rescuing Mr. Lawrence, and Mr. Welker concentrated his efforts on rescuing Mr. Matheny. Each time the ring was tossed to Mr. Matheny, he would reach out to grab it, but the ring would slip out of his grasp. Then he would bob down under water and back up again. This occurred three times. The third time that Mr. Matheny's head went under water, it stayed submerged for a slightly longer period and, when it emerged, he looked different.

At this point, Mr. Van Zant turned his attention to Mr. Matheny's rescue. Mr. Welker grabbed an eight-foot pike pole to hook Mr. Matheny and bring him to the boat. The tugboat was approximately 6 feet away from Mr. Matheny. The boat contained another pike pole which was 20 feet long, but the deckhands did not use the longer pike pole because it was difficult to maneuver. After the deckhands succeeded in pulling Mr. Matheny to the side of the boat,

all three men cooperated to lift him onto the deck. Captain Ralls and Mr. Van Zant checked Mr. Matheny's pulse and then began assisted breathing. Two to three minutes passed between the time at which Mr. Welker grabbed the pike pole and when Mr. Matheny was brought onto the deck.

Meanwhile, Mr. Lawrence was still in the water, holding onto a cooler. At one point, Captain Ralls had to go back up to the tower to redirect the boat, as it was going to pass Mr. Lawrence. Mr. Welker continued to throw the life ring at Mr. Lawrence; eventually Mr. Lawrence grabbed the life ring and was hauled onto the deck.

Once on deck, Mr. Lawrence asked about his cousin and was told that the men were "working on it." Captain Ralls and the deckhands were attempting cardiopulmonary resuscitation on Mr. Matheny. Soon they were able to bring the tugboat to shore. Someone was able to pass a defibrillator to the men on deck and they used it on Mr. Matheny. Eventually TVA's emergency team arrived, and they brought Mr. Matheny to shore on a skiff. Soon thereafter, Mr. Matheny was taken to a local hospital, where he was pronounced dead.

IV. The Condition of the Phantom Boat

The court finds that the Phantom boat did not possess any defects at the time of the accident that contributed to its capsize. There was insufficient evidence to show that the boat, a 1981 Phantom

fiberglass fishing vessel, was overloaded at the time of the capsize, or that the condition of the boat had any contributory effect on its capsize.

At trial, Mr. Sargent, TVA's expert, testified that the Phantom's maximum load of 900 pounds had been exceeded by 18 pounds on the day in question. This calculation relied on estimates such as 20 pounds of fishing poles and tackle, 16 pounds of life jackets, and 10 pounds of clothing. Mr. Sargent admitted that eight of his weight calculations were estimates, and the court does not find these estimates determinative. Although Mr. Lawrence may have loaded his boat close to the maximum capacity, the evidence does not show that he actually overloaded the boat.

In addition, Mr. Sargent testified that the fishing boat violated several regulations listed in 33 C.F.R. Parts 181 and 183. However, on cross examination, Mr. Sargent was unable to state convincingly what those regulations even required, let alone how the Phantom boat failed to meet them. Mr. Sargent testified that the Phantom did not have sufficient flotation material in the space between the inner and outer hull of the boat and that this had caused this area to be flooded. However, Mr. Sargent did not test for this flotation material. He appears to have reached this conclusion by relying on the testimony of another witness who observed – after the fishing boat had capsized – that its hull was not riding properly in the water. This condition, however, does not in and of itself prove that the flotation material requirement was not met, especially in light of Captain Ralls'

testimony that, when he observed the Phantom boat prior to the accident, it was not riding low in the water. Considering the lack of any significant information regarding the flotation material, the court does not find that the Phantom had any such defect.

Although Mr. Lawrence has admitted that, at the present time, the hull of his boat has several cracks, the court does not find the existence of these cracks two years after the accident in question to be very compelling evidence of the condition of the boat at the time of the accident. Considering that the boat suffered a capsize, was subsequently tied against the skimmer wall without any supervision or the use of a bumper, and was then misplaced on a trailer such that the fender of the trailer was digging into the hull of the boat (Plaintiff's Ex. 74M, Defendant's Ex. 20E, 20H), and considering the wear and tear the boat would have suffered in the following two years, the court does not find that the presence of cracks in the hull at the present time establishes that the hull was leaking at the time of the accident. Captain Stoller testified that there was "little reliable evidence to glean" from an inspection performed two years after the accident in question and noted that none of the cracks in the hull identified by Mr. Sargent were visible in the photographs taken in June 2005 or noted by the Tennessee Wildlife Resource Agency ("TWRA") investigators. It is most likely that the cracks were created as a result of the accident and the subsequent handling of the boat, or over the subsequent two years of its use.

Similarly, Mr. Sargent testified that some Phantom boats had been subject to a recall. However, many of the boats identified by Mr. Sargent as having been recalled have very little in common with the boat at issue. For instance, several of the boats were constructed of aluminum, the only similarity with Mr. Lawrence's fishing boat being that they were issued by the same manufacturer. Only 22 of the 1981 Phantom boats were subject to a recall. Moreover, because Mr. Lawrence purchased his boat used, there is no telling whether his boat was actually recalled, repaired by the manufacturer, and returned to the original owner, which is what typically happens upon a recall.

Mr. Sargent pointed to pictures of the Phantom boat shortly after the accident, in which water appeared to be pouring out of small holes in the upper part of the hull, as evidence of preexisting damage; however, he subsequently admitted that a working bilge pump also could have accounted for the streams of water evident in these pictures. (*See* Defendant's Ex. 20E) Other photographs indicated tubing that, Mr. Sargent admitted, could be a working bilge pump. (Defendant's Ex. 20H, 20I, 21A) Testimony of other witnesses indicating that the boat did have a working bilge pump and the location of the holes through which the water poured – at the very top of the sides of the boat, which would be floating above water – and the apparent intensity of the water pressure in the photographs lend considerable weight to the finding that the bilge pump was operating in the

photographs in question. Other pictures offered at trial appeared to show water coming out of the boat's drain, which is perfectly consistent with a drain plug having been removed from the boat in order to drain the boat, which would be necessary after a capsize. (*See* Defendant's Ex. 23B, 20C, 20D)

Other photographs offered at trial showed that, two years after the accident, parts of the boat's interior had been patched. Mr. Lawrence explained at trial that the speedometer and pitot tube – which were damaged in the accident at issue in this case – had been located in these areas and subsequently removed. Cement was used to seal the areas where these instruments had once been located. Similarly, Mr. Lawrence testified that the bilge pump in his boat was later removed because it never worked after the accident, possibly because it was inadvertently left running for a long period of time after the accident, which was when the photographs, which appear to capture its operation, were taken. (*See,* Plaintiff's Ex. 20D, 20E) Overall, these photographs are most consistent with a boat being drained and its bilge pump operating to remove water after it was capsized.

Finally, Mr. Lawrence testified at trial that life vests were within reach of himself and Mr. Matheny on the boat and that, when the capsize occurred, he threw one of them to Mr. Matheny. Although Captain Ralls, Mr. Van Zant, and Mr. Welker testified that they did not directly observe any life vests, two working life vests were recovered by the TWRA and

appear in photographs taken of the boat on the night in question. Accordingly, the court finds that the life vests were on the boat, in reach of Mr. Lawrence and Mr. Matheny.

V. Training Received By Captain Ralls and his Crew

The training received by Captain Ralls and his crew and the testimony of David Duke, a primary supervisor at the Cumberland River steam plant[2], regarding the policies of TVA indicate that TVA was aware that a tugboat's excessive speed could cause accidents such as occurred in this case. Captain Ralls has a first class pilot license as well as a tow-operator license and has had safety training in conjunction with obtaining these licenses. In addition, Captain Ralls has earned endorsements to his licenses, allowing him to work on the deck of a boat, to use the radio, and to observe radar. Captain Ralls has been tested on the "Rules of the Road" portion of the Inland Rules of Navigation by the Coast Guard, specifically regarding passing, crossing situations, risk of collision, safety, and good seamanship. He has been trained in collision avoidance and considers the wake of his boat hitting another boat to be a collision. He

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[2] Mr. Duke testified that, as coal tower foreman, he is the first-in-command at the Cumberland plant. As such, Mr. Duke supervises the coal hauling foremen, the tugboat operators, coal conveyor dumping operators, deckhands, and laborers, and he is required to sign all personnel evaluations.

has worked at several TVA harbors and has no prior citations or investigations regarding his performance.

Captain Ralls testified that he was never told by any supervisors to keep a "no wake" speed in the presence of fishing boats or any other boats, but that he could have done so if he had been so instructed. The defendant did proffer some training course material that was used by TVA in its skills training courses, relating to hand signals, man-overboard training, work hazard training, hazard recognition and control, and boating safety, (Plaintiff's Ex. 34), but Mr. Ralls testified that TVA's training courses had never discussed the specific issue of a vessel capsizing when it crossed an excessive wake of another vessel. Mr. Ralls stated that he did not believe that TVA had ever discussed wake issues in the training sessions.

Mr. Van Zant testified about the man-overboard drills conducted by the crew. In those drills, the tugboat crew is radioed from the tower with a message that there is a man overboard in a particular location of the river. Simultaneously, a dummy is dropped in the river at that location. The crew must then travel to the specified location and retrieve the dummy, using a pike pole. The crew does not practice with the life rings for the practical reason that the dummy cannot reach out and grab them. In addition, Mr. Van Zant testified that he had attended the rivers and deck skills training course and the hazard communication course for deck hands.

David Duke is presently the coal haul foreman at TVA's Cumberland City plant. As such he is ultimately responsible to ensure that the employees of the Cumberland City plant obey safety rules. Mr. Duke testified that TVA has no yearly training program specifically for tugboat operation, but that TVA does require yearly evaluations for the tugboat pilots, which he signs. TVA does not train the pilots in the "Rules of the Road" except through informal "on river" training. The rules are not discussed at the rivers and decks training course. At his deposition, Mr. Duke testified that he did not believe that the Inland Rules of Navigation – which include the "Rules of the Road" – apply at all to tugboat operation. In addition, Mr. Duke testified that no aspect of the drowning was a safety issue for TVA and, therefore, it was not addressed at any safety meetings or any other meetings. At trial, Mr. Duke reversed himself and testified that he thought that the Inland Rules of Navigation did apply, but he did not know how many there were or where they were listed. He thought they included the requirements to keep watch, keep the boat lit, avoid collision, and to operate at a safe speed.

David Duke testified that there was no specific policy regarding the speed of tugboats, but that there was an expectation that the tugboats would be operated as slowly as possible around fishing boats, with as little wake as possible, "according to the circumstances." He testified that it is possible to operate the Patricia H. at a no-wake speed. Moreover, if a

tugboat was 40 to 50 feet away from a fishing boat, which was itself next to a barge, Mr. Duke testified that the pilot should keep the wake "as little as possible." Mr. Duke testified that, if he observed a tugboat operating at an unsafe speed, he would call down about it and would have a duty to react, but that he had never had occasion to do that. However, Mr. Duke does not work the night shift, which is when Jeff Ralls pilots the tugboat and when the accident in this case occurred.

Mr. Duke testified that he had found no records of any prior incidents regarding Captain Ralls; however, he did not search the pilot logs for evidence of any such incidents. In the present case, the only record of Captain Ralls' connection to the accident was in the pilot logs. Therefore, if Captain Ralls had been in prior accidents, Mr. Duke probably would not have found evidence of that. In addition, Mr. Duke testified that Captain Ralls was the most experienced tugboat captain in the Cumberland City plant.

CONCLUSIONS OF LAW

I. Proportional Liability of the Parties for the Accident

Under maritime law, "the elements of negligence are generally the same as a common law negligence action, *i.e.*, duty, breach, causation and damages." *Hartley v. St. Paul Fire & Marine Ins. Co.*, 118 Fed.Appx. 914, 919 (6th Cir.2004) (citing *Pearce v. United States*, 261 F.3d 643, 647-48 (6th Cir.2001); 1

Thomas J. Schoenbaum, Admiralty & Maritime Law § 5-2 at 183 (4th ed.2004)). Additionally, under maritime law, the duty of care can be derived from "duly enacted laws, regulations, and rules; . . . custom . . . or . . . the dictates of reasonableness and prudence." *Galentine v. Estate of Stekervetz,* 273 F.Supp.2d 538, 544 (D.Del.2003) (citing *Pennsylvania R. Co. v. The Marie Leonhardt,* 202 F.Supp. 368, 375 (E.D.Pa.1962); *see also Biscayne Aqua-Center, Inc. v. Hernandez,* 630 So.2d 620, 621-22 (Fla.App.1993)).

The Inland Rules of Navigation, 33 U.S.C. § 2002, supply applicable standards of care for determining negligence in admiralty actions. The Inland Rules of Navigation supply "rules of the road" that courts have applied in determining the duty of care in admiralty actions. *See Turecamo Mar., Inc. v. Weeks Dredge No. 516,* 872 F.Supp. 1215, 1229 (S.D.N.Y.1994) (holding that the Inland Rules of Navigation "encompass long-standing steering and sailing rules and principles, otherwise known as 'Rules of the Road,' which govern navigation on inland water"); *Federal Ins. Co. v. S.S. Royalton,* 312 F.2d 671, 675-6 (6th Cir.1963) (applying an earlier version of the "rules of the road" in an action for contribution in admiralty). Both the plaintiff and the defendant have identified several Inland Rules of Navigation, as well as additional regulations, that apply in determining the standard of care for both parties.

As to the element of causation, the doctrine first enunciated in *The Pennsylvania,* 86 U.S. (19 Wall.) 125, 136, 22 L.Ed. 148 (1873) applies. Under that

doctrine, "when a statutory rule intended to prevent an admiralty accident exists and a party violates that statute injuring a party whom the statute was created to protect, the violating party, to avoid liability, must show that its violation *could not have been* the cause of the accident." *Pearce v. U.S.*, 261 F.3d at 648 (emphasis in original) (citing *The Pennsylvania*, 86 U.S. at 136); *see also Grosse Ile Bridge Co. v. American Steamship Co.*, 302 F.3d 616, 622 (6th Cir.2002) ("[W]here a vessel at the time of a collision is in violation of a statutory or regulatory rule intended to prevent such a collision, the violation is presumed to be at least a contributory cause of the accident . . . [and] [t]o rebut this presumption, the vessel in violation of a rule must prove not only that the violation was not in fact the cause of the accident, but that the violation *could not* have been a cause of the accident.") (emphasis in original) (internal citations omitted). Accordingly, once it is shown that either party violated one of the applicable rules, the burden shifts to the violator of that rule to show that its violation could not have been the cause of the accident.

In addition, proportional division of liability applies to all admiralty cases. *See, e.g., Phillips Petroleum Co. v. Stokes Oil Co., Inc.*, 863 F.2d 1250, 1255 (6th Cir.1988) ("Damages in admiralty cases are generally allocated among tortfeasors based on comparative fault."). The Supreme Court has held that, although the damages assignable to the plaintiff's (or, as in this case, the decedent's) own culpability must be subtracted from whatever damages the plaintiff

has proven at trial, the defendant would still be liable "in full for the remainder," even where a third party's negligence contributed to the injuries. *See Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 260, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979). The plaintiff has identified this state of affairs as an example of joint and several liability, although, as the defendant points out, this label is somewhat inapt: joint and several liability applies "where there has been a judgment against multiple defendants," *McDermott, Inc. v. AmClyde,* 511 U.S. 202, 221, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994), whereas, in admiralty law, a defendant may be liable for the proportion of fault assignable to another culpable party who was not named as a defendant. *See Edmonds,* 443 U.S. at 273, n. 30, 99 S.Ct. 2753 ("[T]he general rule is that a person whose negligence is a substantial factor in the plaintiff's indivisible injury is entirely liable even if other factors concurred in causing the injury," although, "[n]ormally, the chosen tortfeasor may seek contribution from another concurrent tortfeasor.")

Accordingly, the court must first determine whether the defendant's negligence was a substantial cause of the decedent's injury; if so, the court must allocate damages to the plaintiff in the amount of the total loss, minus the damages attributable to the plaintiff's own proportionate fault. Next, the court will determine whether the third-party defendant, Mr. Lawrence, committed any negligent acts that also substantially caused the decedent's injuries and, if so, what proportion of the damages should be allocated to

him. Finally, the court must determine liability and proportionate fault as it relates to Mr. and Mrs. Lawrence as counter-plaintiffs.

A. Apportionment of Fault

The court finds that Captain Ralls' negligent operation of the Patricia H. was a substantial cause of the decedent's injury. In fact, the court finds that Captain Ralls' creation of an excessive wake was 100% responsible for the capsize of the fishing boat and the death of Mr. Matheny. Accordingly, the court also finds that Mr. Lawrence and Mr. Matheny were each 0% responsible for the accident. No set-off will be apportioned against Mr. Lawrence.

1. Captain Ralls' Negligent Operation of the Tug

The following Inland Rules of Navigation have been identified by the plaintiff as having been violated by the defendant: Rule 2(b), which provides that "[i]n construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances, including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger;" Rule 5, which provides that "[e]very vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal

of the situation and of the risk of collision;" Rule 6, which provides that "[e]very vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision[3] and be stopped within a distance appropriate to the prevailing circumstances and conditions;" Rule 7(a), which provides that "[e]very vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists;" and Rule 9(a)(i), which provides that "[a] vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable." 33 U.S.C. §§ 2002, 2005-7, 2009.

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[3] The plaintiff cites *Bernert Towboat Co. v. USS Chandler*, 666 F.Supp. 1454, 1457 (D.C.Or.1987), for the proposition that "[t]he term 'collision' is used in its broadest sense so that it applies to a tug striking a ship's wake." However, the defendant cites *Turner v. Pleasant*, No. Civ. A. 01-3572, 2004 WL 169801 at *4 (E.D.La. Jan.27, 2004), for the propositions that, with regard to the wake, the defendant owed only "a duty of reasonable care to appreciate the reasonable effect of its wake and to take reasonable precautions to avoid creating unusual swells that may injure others," and that only "'unusual' swells or suction which cannot be reasonably anticipated furnish the basis for a claim." This authority can be reconciled. The defendant owed no more than a duty of reasonable care to avoid the creation of an unusual swell or wake; however, violation of any of the Inland Rules of Navigation in conjunction with an unusual swell or wake would create a presumption that this duty was not met. *See Pearce v. United States*, 261 F.3d 643, 648 (6th Cir.2001) (discussing the *Pennsylvania* doctrine).

In addition, the plaintiff has identified 33 C.F.R. § 164.78 as providing an applicable standard of care that the defendant violated. 33 C.F.R. § 164.78(a)(7), which is one of the Federal Navigation Safety Regulations that have been promulgated by the Coast Guard, provides that "[t]he owner, master, or operator of each vessel towing shall ensure that each person directing and controlling the movement of the vessel . . . [p]roceeds at a safe speed taking into account the weather, visibility, density of traffic, draft of tow, possibility of wake damage, speed and direction of the current, and local speed-limits." However, as the defendant points out, this language expressly applies only to vessels in the act of towing. Not only does the regulation refer to "each vessel towing" as opposed to "each towing vessel," but it also mandates that the speed of the vessel must take into account the "draft of tow," which, of course, would not exist were the vessel not engaged in the act of towing. The defendant's vessel, the Patricia H., was traveling "light boat," or without a barge, and was not towing anything at the time in question. Therefore, this particular regulation does not apply to the case at hand.[4]

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[4] In addition, as the defendant has pointed out, 33 CFR § 164.01 provides that "[t]his part (except as specifically limited by this section) applies to each self-propelled vessel of more than 1600 or more gross tons," and then proceeds to identify §§ 164.70 through 164.82 as applying to "towing vessels of 12 meters (39.4) feet or more in length." The Patricia H. weighs 95 gross tons and is 52.5 feet long. Accordingly, 33 C.F.R. § 164.11 – identified by the plaintiff in the parties' Joint Proposed Pretrial Order

(Continued on following page)

The court finds that Captain Ralls violated Rules 2(b) and 6 of the Inland Rules of Navigation by operating the Patricia H. at an excessive speed when it passed the fishing boat. Rule 2(b) requires that "due regard shall be had to all dangers of navigation and collision and to any special circumstances . . which may make a departure from these Rules necessary to avoid immediate danger." The facts of this case demonstrate that Captain Ralls simply did not have due regard to the danger that his wake posed to Mr. Lawrence and Mr. Matheny. Although the exact speed of the Patricia H. and exact size of the tugboat's wake cannot be determined, the facts of this case demonstrate that the speed was great enough to create a wake that was large enough to sink a nearby vessel. Far from taking action to avoid an immediate danger, the Patricia H. created an immediate danger to Mr. Lawrence's fishing boat. The Patricia H.'s wake caused another vessel to capsize; therefore, Captain Ralls violated Rule 2(b) by failing to pay due regard to all dangers of navigation and collision to avoid immediate danger.

(Docket No. 89) – does not apply. Similarly, § 164.01(b) provides that if a towboat is "used solely within a limited geographic area, such as a fleeting-area for barges or a commercial facility, and used solely for restricted service, such as making up or breaking tows," then it is exempt from the requirements set forth in § 164.72. 33 C.F.R. § 164.01(b). Those requirements involve navigational-safety equipment, such as radar, searchlights, VHF-FM radio, magnetic compasses, charts and maps. § 164.72. The plaintiff has identified no requirements involving equipment that apply to the Patricia H.

Rule 6 of the Inland Rules of Navigation provides that each vessel "shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision." The facts of this case demonstrate that Captain Ralls was not operating the Patricia H. at a safe speed, considering that the fishing boat was in a position such that it had to cross the Patricia H.'s wake. Once again, although the precise speed of the Patricia H. at the time in question remains unknown, it is known that the Patricia H. was going fast enough to create a wake that caused another boat to capsize. That is an unsafe speed. In addition, Captain Ralls was demonstrably unable to take proper and effective action to avoid collision, inasmuch as the fishing boat could not escape colliding with the Patricia H.'s wake. By operating the boat at a great enough speed to create a wake that swamped another boat, Captain Ralls violated Rule 6.

Sufficient evidence was not presented at trial to demonstrate that Captain Ralls or TVA violated Rules 5, 7(a), or 9(a)(i) of the Inland Rules of Navigation. Rule 5 requires that each vessel must maintain a proper look-out by sight and hearing, and by all other appropriate means, in order to avoid collisions. Although, at the time of the accident, the deckhands were inside the cabin of the Patricia H., and were not on deck, this, in itself, does not demonstrate a violation of Rule 5. The uncontradicted testimony of Captain Ralls was that, when the Patricia H. was traveling "light boat," it did not require lookouts because Captain Ralls' vision was unobstructed. In

fact, the evidence at trial demonstrated that Captain Ralls had no difficulty seeing the fishing boat. He saw it on his first trip to the group of downstream coal barges and, again, on the second trip. The accident occurred, not because Captain Ralls could not see the fishing boat, but because he operated the tugboat at an unsafe speed.

Similarly, there was not sufficient evidence to demonstrate that the defendant did not "use all available means" to determine if a risk of collision existed, as required by Rule 7(a). The issue was not that Captain Ralls or his crew failed to use the appropriate means to determine whether the risk existed, but simply that, given the information that should have alerted them to a risk, they did not take the appropriate action of reducing speed. Or, put more simply, the evidence at trial did not suggest a failure of the information provided to Captain Ralls about his surroundings but, rather, a failure to act appropriately in light of that information. Captain Ralls saw the fishing boat and, accordingly, knew the position of that boat relative to his own. As an experienced tugboat captain, Captain Ralls should have been able to estimate his speed by consulting the mile markers and should have known what size of wake was associated with that speed. Nevertheless, Captain Ralls' wake capsized the boat. It was not a break in the means of information that caused this accident but merely Captain Ralls' decision to maintain a certain speed.

Finally, there was not sufficient evidence to find that the Patricia H. failed to "keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable," as is required by Rule 9(a)(i). Of course, it is not only the size of the wake that caused the accident, but also the position of the boats. If the Patricia H. had been running at top speed several miles away from any other water craft, it would not have been creating an unsafe wake. However, no evidence at trial demonstrated that the Patricia H. could have approached the coal barge in question from a different position in the channel or that it was not as close to the outer limit of the channel as was safe and practicable. Although the proximity of the Patricia H. to the fishing boat was, along with the speed of the boat, a contributing factor to the accident, evidence did not show that it could have achieved its intended position from a different location. Accordingly, the court finds that Captain Ralls violated the speed requirement set forth in Rule 6, but not the "outer limit" requirement of Rule 9(a)(i).

Under the rule announced in *The Pennsylvania*, 86 U.S. at 136, Captain Ralls' violation of Rules 2(a) and 6 are presumed to be "at least a contributory cause of the accident," and the burden shifts to the defendant to rebut this presumption by proving "not only that the violation was not in fact the cause of the accident, but that the violation *could not* have been a cause of the accident." *Grosse Ile Bridge Co. v. American Steamship Co.*, 302 F.3d at 622 (emphasis in

original). The defendant has not met this burden. It is undisputed that, at the time of the accident, the water was calm and the weather was mild. Mr. Lawrence's fishing boat was moving very slowly into the channel when Mr. Lawrence first saw the Patricia H. on its second trip. Mr. Lawrence soon realized that the tugboat's wake would be a problem, so he tried, first, to outrun the wake and, second, to override it. But the fishing boat was swamped by the wake. Captain Ralls' violations of Rules 2(a) and 6, by operating the boat at an excessive speed, caused the size of the wake. Therefore, not only is it the case that the violations *could have* been a cause of the accident, but, in fact, the evidence at trial demonstrated that the violations *did* cause the accident. Accordingly, the defendant has not met his burden under *The Pennsylvania* rule, and the presumption of causation remains in favor of the plaintiff.

2. The "Last Clear Chance" Doctrine

The parties agree that the last clear chance doctrine generally applies to wrongful death actions in admiralty, although the plaintiff argues that it cannot apply in the present case because the decedent was not himself the pilot. This does not answer the question, however, of how exactly the doctrine applies within the proportional division of liability regime in admiralty actions. In such actions, courts have applied the doctrine in conjunction with the requirement of proximate causation; however, they have not applied it to bar liability where proximate cause was

not in question. *See Matter of Crounse Corp.*, 956 F.Supp. 1392, 1396 (W.D.Tenn.1996) ("*Sofec* differentiates between the proximate causality of supervening cause or last clear chance, and the discarded remains of supervening cause or last clear chance in their ameliorative utilities.") (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837, 116 S.Ct. 1813, 135 L.Ed.2d 113 (1996)).

In *Sofec,* the Supreme Court adopted Professor Schoenbaum's explanation that "[t]he doctrine of superseding cause is . . . applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable." *Sofec,* 517 U.S. at 837, 116 S.Ct. 1813 (quoting 1 T. Schoenbaum, Admiralty and Maritime Law § 5-3, p. 165-66 (2d ed.1994)). In this way, "[T]he superseding cause doctrine can be reconciled with comparative negligence" because "it operates to cut off the liability of an admittedly negligent defendant, and there is properly no apportionment of comparative fault where there is an absence of proximate causation." *Id.*

That is, the last clear chance doctrine applies only insomuch as it is defined as a bar to liability when a superseding event has destroyed the proximate causation for the preceding negligent act. It is not enough, under this formulation, for the defendant to point to some negligent act or omission that occurred after the defendant's chief negligent acts. Instead, the defendant must show that the subsequent

act or omission was (1) of independent origin and (2) not foreseeable. *See Stolt Achievement, Ltd. v. Dredge B.E. LINDHOLM,* 447 F.3d 360, 368-69 (5th Cir.2006) (holding that the *Sofec* rule could not preclude liability where "all of the negligent acts occurred within a very small window of time").

The plaintiff does not cite any support for her contention that the last clear chance doctrine cannot apply because the decedent was not himself operating a vessel. In light of the formulation adopted by the Supreme Court – that this doctrine is merely a corollary of the proximate cause requirement – there is no real justification for such a limitation. Under *Sofec,* the last clear chance doctrine remains in force only because it prevents liability where the chain of causation has become overly tenuous. *See In re Kinsman Transit Co.,* 338 F.2d 708, 722 (2d Cir.1964) (Friendly, J.) ("[T]here must be a terminus somewhere, short of eternity, at which the second party becomes responsible in lieu of the first."). This rationale applies equally whether it is the plaintiff or some other party – or, indeed, a force of nature – that committed the superseding act.

Nevertheless, the last clear chance doctrine does not apply to the case at hand because no act or omission of the decedent or the pilot of the vessel (Mr. Lawrence) or any other person or force that contributed to the decedent's drowning was both (1) independent in origin from the defendant's acts and (2) unforeseeable to the defendant. The relevant actions committed by Mr. Lawrence in this case –

assuming that his fishing boat was in the position that the defendants allege – are that he tied his boat off to a skimmer wall, fished there for a time, then untied it and began to move, slowly, into the channel. At this point, Mr. Lawrence first encountered the Patricia H. Surmising that the wake would overwhelm his boat, Mr. Lawrence tried to outrun it, but he could not because there was not sufficient room. So he turned back to face the wake, which – as he was afraid it might – overwhelmed his boat. It was not negligent for Mr. Lawrence to fish with his boat tied to the skimmer wall, and it was not negligent for him to decide to move away from the skimmer wall, never having seen the Patricia H. passing by on its first trip.

Even if the court were to find that the actions that Mr. Lawrence took in response to the unsafe wake created by the Patricia H were negligent, they would neither have been (1) independent in origin from Captain Ralls' acts or (2) unforeseeable to Captain Ralls. Actions taken in direct response to a danger cannot be said to be independent of that danger. To the contrary, the origin of Mr. Lawrence's actions attempting to avoid and, later, to withstand the wake is found directly in the creation of the wake by Captain Ralls' tugboat. Similarly, it cannot be said that the actions that Mr. Lawrence took in his attempt to avoid the wake were unforeseeable to Captain Ralls. If a person creates a hazard to another person, it is quite foreseeable that this hazard will inspire actions taken to avoid it.

Evidence at trial indicated that both outrunning a wake and facing the wake directly to ride over it are common strategies for overcoming such hazards. For instance, Captain Stoller testified that it was proper for Mr. Lawrence to steer into the wake to attempt to ride over it. In addition, James Stanley, an avid fisherman, testified that the only way to withstand a heavy wake, aside from outrunning it, is to face the wake at a perpendicular angle and ride over it. No witness contradicted this testimony. Accordingly, Captain Ralls should have expected that Mr. Lawrence would try either to outrun or ride over the wake that the Patricia H. created.

Finally, because the court finds that Mr. Lawrence's boat was in proper working condition and not overloaded, the boat's condition cannot have been an act or omission that contributed to the accident. However, it is important to note that, even if the boat had been in poor condition or had been overloaded, Captain Ralls would have been able to observe this condition from his position in the tugboat by noting how low the fishing boat was sitting in the water. If, as the defendant alleges, the space between the boat's outer and inner hull had been waterlogged or did not contain the proper amount of flotation material, the Phantom would have been riding low in the water. Captain Ralls, however, testified both that he was able to observe how low the boat was riding *and* that it was not, in fact, riding low in the water. This testimony leads the court to conclude both that the condition of the boat was not defective and that, even

if it had been, the condition would not have been unforeseeable to Captain Ralls, since he could observe how the boat was sitting in the water from his tower.[5] Accordingly, the last clear chance doctrine does not act to bar the defendant's liability for Captain Ralls' negligence.

3. The Failed Rescue

The defendant has identified 46 U.S.C. § 2303(a)(1) as providing the applicable standard of care for the claims arising from its alleged failure to adequately rescue the decedent, whereas the plaintiff has identified 46 U.S.C. § 2304. The first provision, 46 U.S.C. § 2303(a)(1), provides that "[t]he master or individual in charge of a vessel involved in a marine casualty shall . . . render necessary assistance to each individual affected to save that affected individual from danger caused by the marine casualty, so far as the master or individual in charge can do so without serious danger to the master's or individual's vessel or to individuals on board." The second provision, 46 U.S.C. § 2304, provides: "[a] master or individual in charge of a vessel shall render assistance to any individual found at sea in danger of being lost, so far as the master or individual in charge can do so without

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[5] Although Captain Ralls did not testify to this, he must also have been able to observe that the two fishermen were not wearing their life jackets – a circumstance that increased the foreseeable danger of the situation.

serious danger to the master's or individual's vessel or individuals on board."

It appears that 46 U.S.C. § 2303(a)(1), which refers specifically to a person in charge of "a vessel involved in a maritime casualty" is the more apt provision; however, the issue is somewhat moot, in that each provision appears to create the same standard of care: the person must render "necessary assistance" to save the individual so far as it can be done "without serious danger" to the vessel or the individuals on board.

The defendant also cites § 2303(c), which provides that "[a]n individual complying with subsection (a) of this section or gratuitously and in good faith rendering assistance at the scene of a marine casualty without objection by an individual assisted, is not liable for damages as a result of rendering assistance or for an act or omission in providing or arranging salvage, towage, medical treatment, or other assistance when the individual acts as an ordinary, reasonable, and prudent individual would have acted under the circumstances." 46 U.S.C. § 2303(c). The defendant argues that a Ninth Circuit case interpreting § 2303(c), *Berg v. Chevron U.S.A., Inc.*, 759 F.2d 1425, 1430 (9th Cir.1985), articulated a standard of care that should be applied in this case. The court in *Berg* found that a "rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." *Id.*

However, the *Berg* case involved a rescuer that was not involved in the accident and, for that reason, is perhaps not the most persuasive authority on the application of § 2303(c) to the case at hand. Moreover, the clear language of § 2303(c) holds defendants liable when they do not act "as an ordinary, reasonable, and prudent individual would have acted" – that is, a negligence standard – and does not include the limitations set forth by the Ninth Circuit in *Berg*. Especially where the rescuer was involved in the accident that necessitated the rescue, the statute is more properly read as creating a negligence standard for rescue, provided that the rescue does not endanger the vessel or crew of the rescuer. *See Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 498 (9th Cir.1991) ("The duty [of rescue] is all the more imperative where the prospective rescuer played a part in the original accident itself.") Reading § 2303(c) in conjunction with § 2303(a) leads to the conclusion that, where the rescuer is *not* acting gratuitously, he must (1) render necessary assistance so long as it does not cause serious danger to the rescuing party, and (2) not be negligent.

In the case at hand, the defendant's attempted rescue – although it failed to save the life of Mr. Matheny – met that standard. No piece of evidence presented at trial indicated that Captain Ralls or his crew hesitated to rescue Mr. Lawrence and Mr. Matheny. Once Captain Ralls and his crew became aware that an emergency existed, they acted as ordinary, reasonable, and prudent individuals would have

acted in attempting to save the two men. Evidence presented at trial showed that, within four minutes of charting course back to the scene of the capsize, the deckhands were throwing life rings to Mr. Matheny and Mr. Lawrence. Captain Stoller, the expert witness for the plaintiff, admitted that throwing the life rings was the appropriate thing to do at this time and continued to be appropriate until the boat was close enough to use the pike pole.

Captain Stoller also testified that the deckhands should have switched to using the pike pole at an earlier time than they did. There was a longer pike pole that could have been used at a greater distance from the two men, but the deckhands did not use it because it was unwieldy. There is no knowing, however, whether using the longer pike pole would have been successful or not. The fact remains that – perhaps several minutes after Captain Stoller testified that they should have – the deckhands did use a medium-sized pike pole to drag Mr. Matheny to the boat. The deckhands' choice not to use the long pike pole does not amount to negligence. Instead, the deckhands' choice was based on a reasonable determination that the life rings would be more effective than the long pike pole because it was difficult to maneuver that pike pole. The fact that they were not ultimately successful in rescuing Mr. Matheny – although it is tragic -- does not necessarily show that their decision was incorrect. The court has no basis to determine whether using the long pike pole would have been more effective. The deckhands' decision

was one that a reasonable person could have made. Accordingly, the court can find no negligence on that basis.

After pulling Mr. Matheny to the Patricia H. with the pike pole, Captain Ralls and the two deckhands all cooperated to pull Mr. Matheny into the tugboat. The crew attempted assisted breathing and then cardiopulmonary resuscitation. The chest compressions continued until the men were able to obtain a defibrillator, which was used on Mr. Matheny to no avail. Soon thereafter, Mr. Matheny was taken to shore on a skiff and put into the care of the TVA rescue crew.

The court can find no negligence in the defendant's attempts at resuscitating Mr. Matheny nor in the promptness with which Mr. Matheny was taken to the hospital. Neither the deckhands nor Captain Ralls were, at the time, certified to perform CPR; however, they had been trained in CPR by the TVA, and the defendant has identified no regulation requiring a tugboat captain or his crew to have CPR certification. The evidence at trial indicated that Captain Ralls, Mr. Van Zant, and Mr. Welker acted as fast as they could to get Mr. Matheny on shore and to a hospital and took all available measures to keep him alive while he was on the tugboat. The evidence at trial did not indicate that any other TVA employee was negligent in taking Mr. Matheny to the hospital. To the contrary, the TVA employees appear to have acted as ordinary, reasonable, and prudent individuals would have acted. Accordingly, the court does not

find that the defendant was negligent in its attempt to rescue Mr. Matheny and Mr. Lawrence.

4. Set-Off Against Mr. Lawrence

In addition to Rules 2(b), 5 and 6 (which have been set forth above) the defendant has identified the following Inland Rules of Navigation as being applicable to Mr. Lawrence's conduct: Rule 15(b), which provides that "Notwithstanding paragraph (a)[6], on the Great Lakes, Western Rivers, or water specified by the Secretary, a power-driven vessel crossing a river shall keep out of the way of a power-driven vessel ascending or descending the river;" Rule 16, which provides that "[e]very vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear;" and Rule 17(a)(i), which provides that, "[w]here one of two vessels is to keep out of the way, the other shall keep her course and speed." 33 U.S.C. §§ 2015-17.

The defendant has also identified a Tennessee Boating pamphlet provided to the public by the Tennessee Wildlife Resources Agency, which identifies "[r]iding on . . . pedestal seats while above an idle

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[6] That paragraph provides that, "[w]hen two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel." 33 U.S.C. § 2015.

speed" as a potential reckless operation of a vessel and requiring that life jackets be kept readily accessible. In addition, the defendant cites a U.S. Coast Guard Regulation providing that life jackets must be "readily available," as well as "[i]n serviceable condition" and "[o]f an appropriate size and fit for the intended wearer." 33 C.F.R. § 175.15.

The court finds that neither Mr. Lawrence nor Mr. Matheny were in violation of any of the above statutes, rules or regulations. Mr. Lawrence took all available actions, under the circumstances, to avoid the accident. No evidence was presented at trial implicating Mr. Lawrence's look-out or his ability to make a full appraisal of the situation and the risk of collision. Mr. Lawrence was operating his fishing boat at a safe speed – Captain Ralls testified that the Phantom was "creeping forward" just before the accident occurred. The evidence at trial indicated that Mr. Lawrence took all available means in keeping out of the way of the tugboat as it descended the river, taking early and substantial action once Mr. Lawrence saw the tugboat. Finally, the evidence at trial indicated that Mr. Matheny was not sitting on a "pedestal seat" but instead on a seat that sat flush against the upper deck, with his feet resting on the lower deck, and that two life jackets were both readily available and in serviceable condition. No evidence was presented at trial indicating that either life jacket was not of an appropriate size and fit for the intended wearer.

Further, the court notes that, because the defendant caused a hazard that Mr. Lawrence was forced to act to avoid, the *in extremis* doctrine applies to Mr. Lawrence's subsequent conduct. Under the *in extremis* doctrine, "the decisions of a captain are to be leniently judged when his or her vessel is put in sudden peril through no fault of its own." *Grosse Ile Bridge Co. v. American Steamship Co.,* 302 F.3d 616, 625 (6th Cir.2002) (citing *Union Oil Co. of California v. The Tug Mary Malloy,* 414 F.2d 669, 673-74 (5th Cir.1969)). In *The Maggie J. Smith,* 123 U.S. 349, 355, 8 S.Ct. 159, 31 L.Ed. 175 (1887), the Supreme Court upheld the *in extremis* rule, finding that, "if one vessel is brought into immediate jeopardy by the fault of another, the fact that an order other than that which was given might have been more fortunate will not prevent the recovery of full damages." Instead, "[w]here one ship has, by wrong manoeuvres [sic], placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not manoevred [sic] with perfect skill and presence of mind." *Id.* (quoting *The Elizabeth Jones,* 112 U.S. 514, 526, 5 S.Ct. 468, 28 L.Ed. 812 (1884); *see also The Atlantis,* 119 F. 568, 571-72 (6th Cir.1903); *Slyfield v. Penfold,* 66 F. 362, 366 (6th Cir.1895)).

Mr. Lawrence was put in peril through no fault of his own: Mr. Lawrence was not negligent in first determining to move into the channel because he had not previously seen the Patricia H. passing him. Accordingly, the court will not second-guess Mr.

Lawrence's skill in avoiding the wake, or his decision to first try to outrun the wake and then to turn and face it. The evidence presented at trial indicated that Mr. Lawrence acted according to the standard of a reasonable mariner in a crisis situation.

Finally, at trial, Mr. Sargent identified 33 C.F.R. Parts 181 and 183 as having been violated by Mr. Lawrence relating to the condition of his boat. As discussed above, however, Mr. Sargent was not able to identify any specific provision of those statutes that had been violated, and the court has found none on its own. The photographs taken on the night of the accident are most consistent with a boat, having been capsized, being emptied of excess water by use of a working bilge pump and a removed drain. The fact that the drain was removed in order to remove excess water after the accident does not, in the court's view, demonstrate that the drain was not properly plugged beforehand. Likewise, the appearance of cracks two years after the accident does not prove that the cracks existed at the time the accident took place. The cracks are just as likely the product of the accident itself, the treatment of the boat immediately after the accident, or the wear and tear that occurred over the following two years. The estimates relied upon by Mr. Sargent in testifying that the boat was overloaded were based on a number of generous estimates of the weight of certain items, and the court did not find those estimates to be persuasive. Finally, Captain Ralls testified that, when he viewed the fishing boat, it was not riding low in the water.

Accordingly, the court finds that Mr. Lawrence was not negligent by setting off with Mr. Matheny in the Phantom or in any of his other conduct on the night in question.

B. Limitation of Liability

The limitation of liability statute, 46 U.S.C. § 30505 (formerly § 183), provides that "the liability of the owner of a vessel for any claim, debt, or liability described in subsection (b) shall not exceed the value of the vessel and pending freight." Section 30505(b) provides that, in order to be subject to limitation, claims must arise from an act that is undertaken "without the privity or knowledge of the owner." Further, § 30506(e) provides that, "[i]n a claim for personal injury or death, the privity or knowledge of the master or the owner's superintendent or managing agent, at or before the beginning of each voyage, is imputed to the owner." Limitation of liability does not apply to the case at hand because TVA had privity or knowledge of the risks posed by Captain Ralls' negligent operation of the Patricia H. at an excessive speed.

Limitation of liability involves two inquiries. First, the court must identify the negligent acts at issue and, second, determine whether the shipowner had privity or knowledge of those acts. *See In re Muer*, 146 F.3d 410, 415 (6th Cir.1998); *In re Cleveland Tankers, Inc.*, 67 F.3d 1200, 1203 (6th Cir.1995). With regard to the second inquiry, the "shipowner's privity

or knowledge is not measured against every fact or act regarding the accident; rather, privity or knowledge is measured against the specific negligent acts or unseaworthy conditions that actually caused or contributed to the accident." *Suzuki of Orange Park, Inc. v. Shubert,* 86 F.3d 1060, 1064 (11th Cir.1996). Further, in determining privity or knowledge, "the burden of proof shifts to the shipowner trying to limit liability." *Am. Dredging Co. v. Lambert,* 81 F.3d 127, 129 (11th Cir.1996); *see also In re Muer,* 146 F.3d at 416 ("The burden of proving negligence lies on the person claiming to be injured, but once negligence is established, the vessel's owner must prove lack of knowledge or privity to the negligence.") (quoting *In re Cleveland Tankers, Inc.*, 67 F.3d 1200, 1203 (6th Cir.1995)).

The defendant cannot not meet that burden. In *Spencer Kellogg & Sons v. Hicks,* 285 U.S. 502, 510, 52 S.Ct. 450, 76 L.Ed. 903 (1932), the Supreme Court addressed a situation similar to the case at hand, holding sufficient evidence supported a finding of "privity or knowledge" where a vessel that was "admittedly unfit to run through ice" was, nevertheless, piloted in the Hudson River one afternoon in icy conditions, ultimately resulting in an accident with a floe of ice and the death of over thirty-five passengers. *Id.* In *Kellogg,* it was enough for the relevant decision-makers to know that the vessel should not be piloted in icy conditions to support a finding of "privity or knowledge." *Id.*

Although, as the defendant points out, "navigational errors," in of themselves, are not typically sufficient to defeat limitation of liability, *see, e.g., United States v. Sandra & Dennis Fishing Corp.,* 372 F.2d 189, 198 (1st Cir.1967), and, "without knowledge . . . that its captain was inadequate or unsafe," the defendant would not be imputed with privity or knowledge of general incompetence, *Kristie Leigh Enter., Inc. v. Am. Commercial Lines,* 72 F.3d 479, 482 (5th Cir.1996), *Mac Towing Inc. v. American Commercial Lines,* 670 F.2d 543, 548 (5th Cir.1982), the case at hand does not involve general navigational errors or incompetent captaincy. In fact, the evidence at trial indicated that Captain Ralls had proved himself, up to the time of the accident, to be a perfectly competent captain. Unlike the cases cited by the defendant, the negligent acts alleged in this case were of a more specific nature. In short, Captain Ralls made the tugboat travel too fast for the situation presented. Accordingly, the relative inquiry is whether the defendant had privity or knowledge of the risks posed by tugboats being operated too fast, creating potentially dangerous wakes for nearby fishing boats. The defendant has not shown that it lacked this knowledge.

In fact, David Duke, presently the coal haul foreman at TVA, testified that, due to the danger posed by fast-moving tugboats, the tugboats should be operated as slowly as possible when they are near fishing boats, creating as little wake as possible. In addition, Mr. Duke testified that, in the situation in

which Captain Ralls found himself – where a tugboat was being operated 40 to 50 feet away from a fishing boat, which itself was next to a barge – the pilot should operate at a speed creating as little wake as possible. Nevertheless, Mr. Duke testified that there was no specific policy regarding the speed of tugboats. Further, Captain Ralls testified that he had never been told by any supervisors to keep a "no wake" speed in the presence of fishing boats or any other boats and that, if he had been so instructed, he could and would have done so. None of the training TVA offered its tugboat captains discussed the danger posed by wakes.

This testimony demonstrates that, although TVA was aware of the risk posed by tugboats moving at unsafe speeds in close proximity to small fishing boats, it did not take any steps to reduce that risk. TVA did not even take the minor step of informing its tugboat captains not to operate at a little to no wake speed when in the presence of fishing boats, although, as Mr. Duke testified, such operation is necessary to reduce the risk of capsize. As in *Kellogg*, the defendant was aware that the vessel in question should not be operated in a specific way and yet took no action to prevent it from being operated in that way. Accordingly, the defendant has not demonstrated a lack of

privity or knowledge, and limitation of liability does not apply.[7]

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[7] The plaintiff also argues that limitation of liability cannot apply because TVA has accepted liability for the negligent actions and omissions of its employees under 16 U.S.C. § 831c-2. That is, according to the plaintiff, when TVA accepted liability under § 831c-2, it forfeited its right to raise defenses that would not have been available to its employees as individuals. This argument is unpersuasive. As the defendant points out, § 831c-2 merely substitutes an action against TVA for an action against "any employee . . . while acting within the scope of his office or employment." 16 U.S.C. § 831c-2(1). That is, TVA only accepts liability for official capacity claims. To the extent that an individual capacity claim against Captain Ralls existed, TVA would not be substituted as the defendant and the claim would not be subject to TVA's defenses. TVA's defenses apply to the present claim – and TVA has been substituted as the defendant – only because the underlying claim was brought against Captain Ralls in his official capacity as a tugboat captain. This state of affairs is unremarkable in light of the fact that official capacity suits are traditionally treated as identical to suits against a government entity. *See Myers v. Potter,* 422 F.3d 347, 357 (6th Cir.2005) ("A suit against an individual in his official capacity is the equivalent of a suit against the government entity.") Moreover, § 831c-2(4) provides that all actions for which TVA has accepted liability "shall proceed in the same manner as any action against the Tennessee Valley Authority *and shall be subject to the limitations and exceptions applicable to those actions.*" (emphasis added) Accordingly, it does not appear that § 831c-2 conflicts with the limitation of liability statute but, in fact, made specific allowance for § 30505 and all other statutes that could limit recovery in suits brought against TVA.

C. Discretionary Function

The defendant has also raised the discretionary function doctrine as precluding a number of the plaintiff's allegations. Under the discretionary function doctrine, Congress' waiver of sovereign immunity under the Federal Tort Claims Act does not include "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Rosebush v. United States,* 119 F.3d 438, 440 (6th Cir.1997) (quoting FTCA § 2680(a)). The discretionary function doctrine is a creature of statute, having been written into the FTCA; however, the discretionary function doctrine has also been applied to the Suits in Admiralty Act, *see, e.g., Lawson v. United States,* 124 F.3d 198 (Table), 1997 WL 530540 at * 3 (6th Cir.1997), and the Sixth Circuit has additionally applied the doctrine in a case, such as this one, arising solely from TVA's acceptance of liability under 16 U.S.C. § 831c-2. *See Edwards v. Tennessee Valley Authority,* 255 F.3d 318, 322-23 (6th Cir.2001).[8]

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[8] In *Edwards,* the court held that, because the TVA is "a 'wholly-owned corporate agency and instrumentality of the United States,'" *id.* (quoting *Hill v. United States Dep't of Labor,* 65 F.3d 1331, 1333 (6th Cir.1995)), TVA is, "in certain limited situations . . . exempt from liability arising out of the exercise of certain wholly governmental functions, where the TVA acts solely as the Government's agent and where the United States

(Continued on following page)

Whether or not the discretionary function doctrine applies to a given case is determined according to a two-part test. First, the court must analyze "whether the challenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice." *Id.* (citing *Rosebush,* 119 F.3d 438, 441 (6th Cir.1997) (quoting *Gaubert,* 499 U.S. at 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335)). If a mandatory policy exists, "then 'the discretionary function exception does not apply because there was no element of judgment or choice in the complained of conduct.'" *Id.* If there exists no mandatory policy, "the court must then determine whether 'the challenged conduct is of the kind that the discretionary function exception was designed to shield.'" *Id.*

In determining whether the conduct at issue involved an element of judgment or choice, the court must first "determine exactly what conduct is at issue." *Rosebush,* 119 F.3d at 441. The majority of the plaintiff's allegations involve the conduct of Captain Ralls himself. That conduct comes under the purview of a corresponding mandatory policy, in the form of the Inland Rules of Navigation and the other regulations discussed above. That is, the claims and allegations arising from Captain Ralls' operation of the Patricia H. – namely, that he was going too fast, and did not adequately take into account potential

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itself would not be liable." *Id.* (quoting *Queen v. TVA,* 689 F.2d 80, 86 (6th Cir.1982)).

dangers – do not involve an element of judgment or choice on the part of TVA because they involve violations of mandatory regulations. Accordingly those claims and allegations do not meet the first requirement.

However, the defendant has identified several allegations that do not appear to fall under specific regulations. These allegations are that TVA failed to instruct and train the employees involved in the accident and failed to properly equip the vessel such that the pilot could monitor engine RPM and speed. Although these acts and omissions do not specifically fall under any of the regulations identified by the plaintiff, they do bear a strong, albeit secondary, relation to those regulations. That is, there are specific regulations mandating that vessels maintain an appropriate speed, that pilots take due regard for possible collisions, that crew maintain a proper lookout, and that reasonable steps be taken to rescue individuals in the event that they are thrown into the water following an accident. The allegations involving the failure to train, equip, and maintain appropriate policies all relate to these regulations: the training, equipment, and policies – if they were found to be adequate – would all be in furtherance of compliance. Therefore, this case does not present the situation where the plaintiff's claims evoke discretionary failures wholly unrelated to statutory regulations.

Nonetheless, the allegations regarding TVA policies do not implicate any specific regulations themselves. The plaintiff has identified no applicable state

or federal regulation mandating a certain amount of training or equipment, or a specific speed limit that TVA must adhere to. Under *Rosebush*, there exists an element of judgment or choice with regard to how TVA trains and equips its employees, and as to what its specific policy regarding the speed of tugboats should be.

However, although TVA passes the first part of the analysis with regard to those allegations, it does not pass the second. In *Edwards*, the court identified the following types of decisions that do pass the second part of the analysis: "(1) 'the proper response to hazards,' (2) 'whether and how to make federal lands safe for visitors' and (3) 'whether to warn of potential danger.'" *Id.* (quoting *Rosebush*, 119 F.3d at 441). Two of those three categories are clearly inapt; the plaintiff's claims do not concern "whether and how to make federal lands safe" or "whether to warn of potential danger," but, rather, they relate to specific actions committed by agents of the defendant. The failure to train, equip, and provide policies for those agents likewise does not relate to keeping land safe or failure to warn but, rather, those specific actions.

For similar reasons, the first category also does not apply. This case does not merely involve the response to a hazard but, instead, the creation of a hazard. It would be an odd outcome if, although the court found that specific regulations did cover the underlying conduct, the court were to find that the discretionary function doctrine was "designed to shield" policy failures that directly lead to that prohibited

conduct. If the second requirement is to have any effect at all, it would have to protect liability for some actions that are not specifically prohibited by statute; policy failures that directly bring about prohibited conduct would seem to be first on that list. *Cf. Sutton v. Earles,* 26 F.3d 903, 910 (9th Cir.1994) (holding that the failure to properly notify the public of proper speed limits in navigable waters did not fall under the discretionary function doctrine). Finally, the court notes that, because liability is additionally predicated on Captain Ralls' direct violations of the Inland Rules of Navigation, even if the court were to apply the discretionary function doctrine to bar the plaintiff's claim for negligent supervision and entrustment, it would not preclude the defendant's liability for Captain Ralls' negligence under 16 U.S.C. § 831c-2. The court finds that the discretionary function doctrine does not bar any of the plaintiff's claims or allegations.

E. Negligent Supervision and Negligent Entrustment

As a separate basis for liability, the court also finds that TVA negligently supervised Captain Ralls by failing to specifically instruct him to maintain a low speed or a low wake in the presence of small fishing vessels. Under Tennessee law, TVA owed a duty of care to the plaintiff (and to the counter-plaintiff, Mr. Lawrence), regarding the negligent acts of Captain Ralls performed while he was on duty. *See Lett v. Collis Foods, Inc.*, 60 S.W.3d 95, 99-100 (Tenn.App.2001)

(noting that although it was not clear that Tennessee had adopted the entirety of the Restatement (Second) of Torts § 317, it did follow the special relationship test outlined in Restatement (Second) of Torts § 315-19). TVA's duty of care was that of a reasonable employer under the circumstances. A risk is "unreasonable and gives rise to a duty to act with due care if the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." *McCall v. Wilder,* 913 S.W.2d 150, 153 (Tenn.1995). This determination is to be made in accordance with the following factors:

> [T]he foreseeable probability of the harm or injury occurring; the possible magnitude of the potential harm or injury; the importance or social value of the activity engaged in by defendant; the usefulness of the conduct to defendant; the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; the relative usefulness of the safer conduct; and the relative safety of alternative conduct. . . . Stated succinctly, a duty of reasonable care exists if defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property.

Id. (citing Restatement (Second) of Torts, §§ 292, 293 (1964)).

The defendant violated this standard of care when it failed to instruct its tugboat captains about

the dangers of operating tugboats so as to create wakes when fishing boats were present or, indeed, to implement any policy with regard to speed or wake relative to small boats. The court does not find that the defendant violated its standard of care with regard to its man-overboard drills or its general training course work. That is, in light of the relative usefulness, feasability, and costs associated with the training programs, the evidence at trial did not indicate that the defendant was legally obligated to include more courses or to change its man-overboard drill. However, the defendant could have taken one very simple step, posing little to no cost, and greatly reducing the probability of harm such as occurred in this case, which was to simply inform its tugboat captains that they were not to operate tugboats at a speed that created an excessive wake when fishing boats were present.

TVA allowed fishing boats to freely use this area of the river, maneuvering between and around the numerous coal barges that were deposited, moored and moved to and from the nearby unloader. Yet, Captain Ralls testified that he had "never discussed wake" during TVA's training courses, and that he had never been told to operate the tugboat at a little-to-no-wake speed in the proximity of fishing boats. David Duke testified that there was no specific policy regarding tugboat speed, even though he recognized the danger to smaller boats of the wake created by a fast-moving tugboat. Yet TVA never told Captain

Ralls to operate the tugboat with little to no wake when fishing boats were near.

Such an instruction probably would have averted the disaster that occurred in this case. The fishing boat was capsized because Captain Ralls was operating the Patricia H. at a high enough speed to create an excessive wake. However, Captain Ralls testified that, if he had been told by any supervisors to keep a "no wake" speed in the presence of fishing boats, he could and would have done so. Accordingly, the court finds that both the causation and damages requirements for negligence have been met and that TVA is liable for negligent supervision.

The defendant did not, however, commit negligent entrustment. Negligent entrustment requires a showing that "a chattel was entrusted to one incompetent to use it with knowledge of the incompetence, and that its use was the proximate cause of injury or damage to another." *Watrous v. Johnson,* No. W2007-00814-COA-R3CV, 2007 WL 4146289 (Tenn.App. Nov.21, 2007) (quoting *West v. East Tenn. Pioneer Oil Co. d/b/a Exxon Convenience Store,* 172 S.W.3d 545, 554 (Tenn.2005)); *see also* Restatement (Second) of Torts § 390 (1965). The court does not find that Captain Ralls was incompetent to pilot the Patricia H. In fact, at the time of the accident, Captain Ralls appears to have been the most qualified tugboat captain that TVA employed. Although the court finds that Captain Ralls was negligent in this specific instance, it finds no basis to question his overall

competency as a tugboat captain. Accordingly, TVA did not commit negligent entrustment.

F. The Separate Claim for Loss of Consortium

The plaintiff has brought a separate claim for loss of consortium which, the defendant alleges, cannot provide recovery because such claims are not allowed in admiralty personal injury actions. The defendant admits that *damages* for loss of consortium are available in a maritime action occurring in Tennessee, through application of the Tennessee Wrongful Death Statute, but distinguishes between the application of state law *remedies* and state law *claims* under admiralty law.

There is no basis for this distinction. In *Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 202, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996), the Supreme Court held that "state remedies remain applicable" in maritime actions "and have not been replaced by the federal maritime wrongful death action" recognized in prior Supreme Court decisions. In support of its decision, the Supreme Court reasoned that, although prior decisions had eliminated the states' ability to reduce liability under the federal scheme, it remained possible that a state's remedial scheme could provide a more generous liability or damages regime than federal law. *Id.* at 214-215, 116 S.Ct. 619. Although *Yamaha* dealt solely with the issue of a state damages statute, and not a separate state cause of action for

loss of consortium, the opinion does not appear to rely on a distinction between those two concepts. In fact, the Court stated that, "we preserve the application of *state statutes* to deaths within territorial waters," *Id.* at 216, 116 S.Ct. 619 (emphasis added), which leaves open the possibility of both purely remedial state law and state law which creates causes of action.

In support of its distinction between damages statutes and causes of action, the defendant relies on *Lollie v. Brown Marine Serv., Inc.,* 995 F.2d 1565, 1565 (11th Cir.1993), in which the Eleventh Circuit held that "neither the Jones Act nor general maritime law authorizes recovery for loss of society or consortium in personal injury cases." However, *Lollie v. Brown Marine Serv., Inc.,* a one page opinion which was issued three years prior to the Supreme Court's *Yamaha* decision, appears to apply not only to causes of action for loss of consortium, but to all "recovery" of such damages and, accordingly, may not survive the Supreme Court's contrary decision in *Yamaha* in full. In fact, in a more recent Eleventh Circuit decision, *Tucker v. Fearn,* 333 F.3d 1216, 1224-25 (11th Cir.2003), the court noted that, although federal maritime law did not create an avenue for damages for loss of consortium, under *Yamaha,* state law could provide for such a remedy. In *Tucker,* a loss of consortium claim was impermissible only because the state at issue – Alabama – did not allow for loss of consortium damages in its Wrongful Death Statute. Where the state at issue does allow for loss of consortium damages, the Eleventh Circuit has held that such

damages are cognizable when brought in connection with maritime causes of action. *See American Dredging Co. v. Lambert,* 81 F.3d 127, 130-31 (11th Cir.1996) ("Because . . . no federal statute or common law precedent precludes the personal representatives from recovering non-pecuniary damages under Florida law, we affirm the denial of partial summary judgment on the issue of the recoverability of non-pecuniary damages.").

Since *Yamaha,* several federal courts have held that, concomitant to maritime personal injury and wrongful death actions, state law claims for loss of consortium are valid. *See, e.g., Hester v. Cottrell Contracting, Corp.,* No. 7:00-CV-70-BR(1), 2001 WL 1764200 at * (E.D.N.C.2001) ("Hester's claim for loss of society and consortium, which is cognizable under North Carolina Law . . . may proceed."); *In re Clearsky Shipping Corp.,* No. Civ. 96-4099, 2002 WL 31496659 at *5 (E.D.La.2002) (holding that because, under Louisiana law, the plaintiff could "maintain a claim for loss of consortium damages," such a claim could survive in connection to a maritime personal injury action); *Naglieri v. Bay,* 977 F.Supp. 131, 136 (D.Conn.1997) (holding that, following the *Yamaha* decision, the plaintiffs would be permitted to add a claim to their complaint for loss of consortium). Accordingly, under *Yamaha,* the plaintiff is permitted to request damages for loss of consortium in a separate claim. *See, e.g., Correll v. E.I. DuPont de Nemours & Co.,* 207 S.W.3d 751, 754-56 (Tenn.2006) (analyzing subrogation issues arising from a separate claim for loss of

consortium). The court will analyze the extent of the loss of consortium damages below.

G. Mr. and Mrs. Lawrence's Claims Against TVA

Mr. and Mrs. Lawrence have filed counterclaims against TVA for negligence, negligent supervision and entrustment, and loss of consortium. In short, these counterclaims against TVA are identical to the claims filed by plaintiff Becky Matheny on behalf of her husband. For the same reasons expressed above, the court finds that Captain Ralls' negligence was 100% responsible for the injuries suffered by Mr. Lawrence when his boat capsized, that Mr. Lawrence was 0% responsible for the accident, and that limitation of liability and the discretionary function doctrine do not limit TVA's liability for Captain Ralls' negligence. In addition, TVA is liable for negligent supervision because it did not inform its captains to observe a low wake speed in the presence of fishing boats.

III. Damages

The parties agree that Tennessee law supplies the rule for what damages can be recovered here. Tennessee's Wrongful Death Statute provides the plaintiff with a "right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the . . . injuries, and also the damages resulting to the parties whose use and benefit the right of action survives from the

death consequent upon the injuries received." Tenn.Code Ann. § 20-5-113 (1994 & Supp.2006). Specifically, these damages include conscious pain and suffering, *Patterson v. Dunn, Cowley, Inc.*, No. 02A01-9710-CV-00256, 1999 WL 398083 (Tenn.Ct.App.1999), lost earning capacity, *Interstate Life & Accident Co. v. Cox*, 55 Tenn.App. 40, 396 S.W.2d 80 (Tenn.1965), and loss of consortium, *Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d at 600.

A. Damages Owed to the Plaintiff

The plaintiff is entitled to $2,159,153.00 in compensatory damages, as detailed below.

1. Conscious Pain and Suffering

The evidence at trial indicated that Mr. Matheny died from drowning. Approximately ten minutes after Mr. Matheny fell into the water, he lost consciousness. Over those ten minutes, Mr. Matheny undoubtedly experienced excruciating pain and terror as he struggled to stay afloat and to breathe. The court cannot overstate the difficulty of calculating the pain and suffering associated with drowning in a monetary sum, but awards $75,000 for conscious pain and suffering.

2. Lost Earning Capacity

At the time of his death, Mr. Matheny was 49 years old. Although previously employed by the

Tennessee Department of Corrections, Mr. Matheny was not employed at the time of his death, but was instead acting as primary caretaker for his granddaughter. His last job had been at a car rental service, where he delivered rental cars to customers and drove them back and forth between locations, earning $350 per week. At the time of his death Mr. Matheny was drawing a disability pension from the Tennessee Department of Corrections and had applied for disability benefits from the Social Security Administration.

Mr. Matheny had been out of work in part so that he could serve as primary caretaker to his granddaughter, but also because he suffered from coronary artery atherosclerosis. On September 27, 2004, after a long history of heart problems, Mr. Matheny suffered a heart attack, and he did not work after that point, although Mrs. Matheny testified that he had planned to go back to work. The plaintiff has submitted the opinion of Dr. Jordan Asher, MD, a physician with St. Thomas Hospital, who believes that Mr. Matheny's life expectancy should not be "reduced at all due to his small vascular disease" and that, because his carotid artery had been "fixed," his life expectancy should decrease "at only 2% to 5%." (Docket No. 85, Ex. 1)

The defendant submitted an expert statement from Dr. James E. Davia, an associate professor of medicine in the division of cardiology from the Medical College of Virginia, who stated that, due to Mr. Matheny's "twenty-nine hospital admissions

between 1995 and early 2005, plus one referenced hospitalization in 1991," Mr. Matheny had "a very poor prognosis for survival and would have died as a result of a heart attack or stroke within two or three years and definitely within five years." (Docket No. 75, Ex. A at p. 2) Dr. Davia bases his opinion on medical records and on the autopsy report, which revealed "a significant narrowing in the main left coronary artery which is the worst possible location in the coronary circulation to have an obstruction because of its prognosis for death." (*Id.* at p. 3)

The court finds Dr. Davia's more extensive statement to be persuasive. It is beyond dispute that Mr. Matheny suffered from serious heart disease, requiring multiple hospitalizations, and the court finds that his life expectancy should be modified accordingly.

In addition, the defendant has submitted expert testimony from Dr. Parker Cashdollar, an economic consultant, who has performed calculations regarding the present value of Mr. Matheny's pension and household services, minus the "reasonable necessary expenditures"[9] of the deceased. (Docket No. 92, Ex. 2 at p. 2). According to Dr. Cashdollar's tables, the present value of Mr. Matheny's Tennessee disability pension, minus his maintenance expenditures, assuming a

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[9] Under Tennessee law, damages for lost earning capacity "is not to be measured by the decedent's gross earnings, but by his net earnings, which consist of gross earnings minus personal maintenance expenses." *Wallace v. Couch*, 642 S.W.2d 141, 143 (Tenn.1982) (quoting 76 A.L.R.3d 125 (1977)).

life-expectancy of five years, is $29,402. (Defendant's Ex. 46) The present value of Mr. Matheny's household services for five years is $54,751. (Defendant's Ex. 47) No proof was submitted as to what Mr. Matheny's social security disability benefits would have been, or demonstrating that Mr. Matheny would have qualified for social security benefits. Accordingly, damages in the amount of $84,153 will be awarded for lost earning capacity.

3. Loss of Consortium

Finally, the court addresses damages for loss of consortium. As discussed above, damages for loss of consortium "are not limited to spousal claims but also necessarily encompass a child's loss, whether minor or adult." *Jordan,* 984 S.W.2d at 600. The Tennessee Supreme Court has explained that:

> Loss of consortium consists of several elements, encompassing not only tangible services provided by a family member, but also intangible benefits each family member receives from the continued existence of other family members. Such benefits include attention, guidance, care, protection, training, companionship, cooperation, affection, love, and in the case of a spouse, sexual relations. . . . Although "[a]dult children may be too attenuated from their parents in some cases to proffer sufficient evidence of consortium losses," the "age of the child does not, in and of itself, preclude consideration of parental consortium damages."

Hunter v. Ura, 163 S.W.3d 686, 705 (Tenn.2005) (quoting *Jordan*, 984 S.W.2d at 601); *see also Davidson v. Lindsey*, 104 S.W.3d 483, 493 (Tenn.2003).[10]

Mr. Matheny is survived not only by a wife, but also by two adult daughters and one adult son. As difficult as it is to quantify the pain and suffering caused by drowning, it is perhaps even more difficult to quantify the loss of a husband or father. But the court must do so. The evidence presented at trial indicated that Mr. Matheny had a very close relationship with his children and with his wife. Mr. Matheny's wife and each of his three children will be awarded $500,000 for loss of consortium, for a total of $2,000,000.

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[10] Although Mr. Matheny's adult children were not named as plaintiffs, the Tennessee courts have consistently allowed for such damages when a wife has brought a wrongful death action on behalf of herself and the estate of her spouse. *See, e.g., Hunter*, 163 S.W.3d at 705; *Jordan*, 984 S.W.2d at 601. Therefore, since Mrs. Matheny has brought this action on behalf of both herself and the deceased, Mr. Matheny, such damages may be recovered. *See Davidson v. Lindsey*, 104 S.W.3d 483, 493 (Tenn.2003) (holding that evidence supported an award of loss of consortium damages to an adult child and that a limiting instruction to the jury regarding such damages was not necessary).

B. Damages Owed to Mr. And Mrs. Lawrence

Mr. and Mrs. Lawrence, as counter-plaintiffs, are entitled to recover $238,685.10 in compensatory damages, as detailed below.

1. Personal Injury Damages

Mr. Lawrence spent the night of the accident at Vanderbilt University Hospital. He has not suffered any ongoing physical injuries. However, Mr. Lawrence has submitted his costs for his overnight stay, and the tests that were conducted on him during that stay. The parties have stipulated to Mr. Lawrence's medical expenses as totaling $13,585.10 (Exhibit CP-70), and he shall be awarded those expenses as damages.

In addition, Mr. Lawrence is entitled to damages for the mental anguish he suffered as a result of this accident. Mr. Lawrence spent a period of time in the Cumberland River during which his own safety was very much at issue and, in addition, he bore witness to the drowning of Mr. Matheny, his cousin and close friend. The testimony of Mr. Lawrence, his friends and family clearly establishes that he continues to suffer serious psychological damage from this accident that will continue to some indefinable point in the future. Mr. Lawrence shall be awarded damages in the amount of $150,000 for mental anguish.

2. Loss of Consortium

In addition, Mr. and Mrs. Lawrence have requested damages for loss of consortium. Loss of consortium is available in Tennessee for both personal injury and wrongful death causes of action. *See, e.g., Clark v. Shoaf,* 209 S.W.3d 59, 61 (Tenn.App.2006). Evidence presented at trial indicated that, although Mr. Lawrence has suffered no ongoing physical disability, he has been very much a different person following this accident. Witnesses testified that Mrs. Lawrence has become, in many ways, more a caretaker than a wife, that Mr. Lawrence has become distant and that he is often fixated on the night of the accident. In his current state, Mr. Lawrence's ability to care for and relate to his wife has suffered a diminution. The court awards $75,000 for loss of consortium.

3. Damage to the Phantom Boat

Mr. Lawrence did not submit evidence quantifying the damage to the Phantom boat that resulted from its capsize. However, evidence at trial indicated that there was damage to the bilge pump and other devices, that the seat on which Mr. Matheny had been sitting was lost in the accident, and that the hull was scratched afterwards. The court will award $100 for this damage.

CONCLUSION

Judgment is entered for the plaintiff in the amount of $2,159,153.00 for compensatory damages, and in favor of the counter-plaintiffs in the amount of $238,685.10 for compensatory damages.

An appropriate order will enter.

ORDER

For the reasons expressed in the accompanying Memorandum, judgment is entered for the plaintiff in the amount of $2,159,153.00 compensatory damages, and in favor of the counter-plaintiffs in the amount of $238,685.10 compensatory damages.

It is so Ordered.

BECKY MATHENY, individually and as Surviving Spouse of RONALD MATHENY, Deceased, Plaintiff, v. THE TENNESSEE VALLEY AUTHORITY, Defendant/Third-Party Plaintiff/Counter-Defendant. v. THOMAS LAWRENCE and JOHNNA LAWRENCE, Third-Party Defendant/Counter-Plaintiff and Counter-Plaintiff

Case No. 3:06-0565

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

247 F.R.D. 541; 2007 U.S. Dist. LEXIS 93358

December 11, 2007, Decided
December 11, 2007, Filed

COUNSEL: For Becky Matheny, Individually and as Surviving Spouse of Ronald Matheny, Deceased, Plaintiff: Jonathan R. Perry, LEAD ATTORNEY, The Perry Firm, Franklin, TN; Kristen V. Dyer, Philip Norman Elbert, LEAD ATTORNEYS, Neal & Harwell, Nashville, TN.

For Jeff Rails, Defendant: Thomas A. Robins, LEAD ATTORNEY, Edwin W. Small, Tennessee Valley Authority, Knoxville, TN.

For Tennessee Valley Authority, Defendant: Maureen H. Dunn, LEAD ATTORNEY, Office of the General Counsel, Tennessee Valley Authority, Knoxville, TN; Thomas A. Robins, LEAD ATTORNEY, Edwin W. Small, Jared E. Mitchem, Tennessee Valley Authority, Knoxville, TN.

For Johnna Lawrence, Counter Plaintiff: Mark M. Mizell, LEAD ATTORNEY, Franklin, TN.

For Tennessee Valley Authority, Third Party Plaintiff, Counter Defendant: Edwin W. Small, Thomas A. Robins, LEAD ATTORNEYS, Jared E. Mitchem, Tennessee Valley Authority, Knoxville, TN; Maureen H. Dunn, LEAD ATTORNEY, Office of the General Counsel, Tennessee Valley Authority, Knoxville, TN.

For Thomas Lawrence, Third Party Defendant: Mark M. Mizell, LEAD ATTORNEY, Franklin, TN.

JUDGES: ALETA A. TRAUGER, United States District Judge.

OPINION BY: ALETA A. TRAUGER

OPINION

SUPPLEMENTAL MEMORANDUM AND ORDER

The plaintiff has filed a Motion to Alter or Amend (Docket No. 103), to which defendant TVA has responded in opposition (Docket No. 106). For the reasons discussed herein, the plaintiff's Motion will be granted, and the portion of the court's December 6, 2007 Order granting judgment to the plaintiff in the amount of $2,159,153.00 compensatory damages will be modified as set forth herein.

The plaintiff's motion is most properly analyzed under Rule 59(e) of the Federal Rules of Civil Procedure, which provides that all such motions "shall be filed no later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e). The Sixth Circuit has

held that Rule 59(e) motions "to alter or amend final judgments may be granted based upon a clear error of law, newly discovered evidence, or to prevent a manifest injustice." *Russell v. GTE Government Systems Corp.*, 141 Fed. Appx. 429, 433 (6th Cir. 2005) (citing *GenCorp., Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999)). The plaintiff argues that the court failed to incorporate the deposition testimony of Dr. Marshall Crenshaw, Mr. Matheny's treating physician, in analyzing Mr. Matheny's life expectancy on June 5, 2005. Dr. Crenshaw's deposition testimony, report, and *curriculum vitae* were included in the plaintiff's proof but not read at this bench trial. By inadvertence, the court failed to read that information and include it in its analysis, which was clear error.

Dr. Crenshaw describes himself as an "interventional cardiologist."[1] As Mr. Matheny's treating physician from April 1997 until the time of his death, Dr. Crenshaw was in a unique position to observe the decedent's coronary artery atherosclerosis and related

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[1] According to Brigham and Women's Hospital, a teaching hospital associated with Harvard Medical School, interventional cardiology "refers to various non-surgical procedures for treating cardiovascular disease." Brigham and Women's Hospital, Cardiovascular Center, http://www.brighamandwomens.org/cvcenter/Patient/FAQ/FAQinterventional.aspx#whatis (last visited December 11, 2007). Doctors practicing interventional cardiology "use catheters . . . to get inside blood vessels for diagnostic tests or to repair damaged vessels or other heart structures, often avoiding the need for surgery." *Id.*

health issues. For instance, Dr. Crenshaw has himself assessed the vascularization of Mr. Matheny's heart with dye procedures and has ordered and reviewed cardiac stress tests to determine the heart's oxygen delivery. (Crenshaw Dep. at p. 18) Accordingly, the court must grant Dr. Crenshaw's opinions a certain amount of deference.

Dr. Crenshaw's deposition does not contradict the court's finding that Mr. Matheny suffered from serious heart disease. Mr. Matheny suffered his first heart attack in 1991 and his second, which was treated with an emergent angioplasty of the right coronary artery, in April 1997. (*Id.* at p. 19, 20) In conjunction with this angioplasty, six stints were placed inside Mr. Matheny's right coronary artery. (*Id.* at p. 22) Because these stints were not drug-coated, they have not successfully combated the narrowing of this artery, and Mr. Matheny has returned for successive treatments regarding this issue. (*Id.* at p. 24, 28) In 2001, 50-60% blockage was reported for this artery, demonstrating that Mr. Matheny's coronary atherosclerosis was progressing in this location. (*Id.* at p. 75)

In fact, notwithstanding the drug treatments and Dr. Crenshaw's efforts, Mr. Matheny's overall coronary health appears to have been deteriorating prior to the accident. Additional stints had been placed in Mr. Matheny's circumflex and other arteries. (*Id.* at p. 59). In 2002, an additional angioplasty was performed. (*Id.* at p. 62) Mr. Matheny's ejection fraction, which measures the percentage of blood pumped out of the

heart with each successive beat, was progressively worsening, from 60% in 1997 to 45% in 2003. (*Id.* at p. 67-68). In addition, global hypokinesis, in which the walls move slower than normal, was reported in Mr. Matheny's left ventricle. (*Id.* at p. 68). As indicated by other witnesses, Mr. Matheny was, at the time of his death, a long-standing smoker, and his weight remained a serious health issue. In 1997, when Mr. Matheny began his treatment with Dr. Crenshaw, he weighed 235 pounds; in 2004, he weighed 240 pounds. (*Id.* at p. 83-84) Finally, Mr. Matheny's cholesterol readings appear to have been worsening at the time of his death. In September 2004, which was Mr. Matheny's last reading, all of his cholesterol measurements were above the normal range. (*Id.* at 89)

Nevertheless, Dr. Crenshaw testified that, in the days before Mr. Matheny's drowning, he considered Mr. Matheny's heart disease to be stable. (*Id.* at p. 36) Dr. Crenshaw noted that, if Mr. Matheny were to suffer additional heart attacks, he could still have been treated in a number of ways, such as through the placement of additional stints, bypass surgery, and even heart transplant. (*Id.* at p. 40) Dr. Crenshaw noted that Mr. Matheny did not suffer from diabetes and that his MRI and CT scans had not shown major neurological changes as a result of the stroke. (*Id.* at p. 42, 46) Although the autopsy showed a 75% obstruction in Mr. Matheny's left anterior descending artery, Dr. Crenshaw testified that this percentage overestimated the degree of stenosis because the arteries were not warm and distended, as is the case

when the person is alive. (*Id.* at p. 48-49) In May 2001, Mr. Matheny was found to have 60% and mid-50% lesions in this artery. (*Id.* at p. 73) At 70%, an angioplasty must be performed. (*Id.* at p. 74)

Dr. Crenshaw testified that Mr. Matheny's life expectancy was at least fifteen to twenty years. (*Id.* at p. 51) Dr. James Davia had projected Mr. Matheny's life expectancy at three to five years. Both are medical professionals, but Dr. Crenshaw had been the treating physician for many years. Both projections can only be estimates, and both opinions may be imbued with some element of bias. Taking into account the many cardiac health issues outlined in Dr. Crenshaw's testimony as well as in the defense submissions of Dr. Davia, the court must estimate Mr. Matheny's life expectancy to have been eight years at the time of his death.

According to the tables submitted to the court by Dr. Cashdollar, the present value of Mr. Matheny's Tennessee disability pension, minus his maintenance expenditures, assuming a life-expectancy of eight years, is $45,861. (Defendant's Ex. 46) The present value of Mr. Matheny's household services for eight years is $78,491. (Defendant's Ex. 47) Therefore, damages in the amount of $124,352 will be awarded to the plaintiff for lost earning capacity.

Dr. Crenshaw's deposition testimony also affects the amount of damages that should be awarded to the plaintiff for loss of consortium. In light of that testimony and the court's finding as to life expectancy,

Mr. Matheny's wife and children were deprived of his consortium for eight, rather than five years. Therefore, Mr. Matheny's wife and each of his three children will be awarded $800,000 for loss of consortium, for a total of $3,200,000. In total, the plaintiff is entitled to $3,324,352 compensatory damages.

For the reasons expressed herein, it is hereby **ORDERED** that the plaintiff's motion to amend is **GRANTED.** The portion of the court's December 6, 2007 Order granting judgment to the plaintiff in the amount of $2,159,153.00 compensatory damages is herein **MODIFIED** to grant judgment to the plaintiff in the amount of $3,324,352.00.

It is so ordered.

Enter this 11th day of December 2007.

/s/ Aleta A. Trauger
ALETA A. TRAUGER
United States District Judge

No. 08-5127

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BECKY MATHENY, INDIVIDUALLY AND AS SURVIVING SPOUSE OF RONALD MATHENY, DECEASED, Plaintiff-Appellee, v. TENNESSEE VALLEY AUTHORITY, Defendant/Third-Party Plaintiff/Counter Defendant-Appellant, JOHNNA LAWRENCE, ET AL., Third-Party Defendants/ Counter Plaintiffs-Appellees.	ORDER (Filed May 22, 2009)

BEFORE: SUHRHEINRICH, GRIFFIN, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

BECKY MATHENY,
Individually and as
Surviving Spouse of
RONALD MATHENY,
Deceased Plaintiff

v.

THE TENNESSEE
VALLEY AUTHORITY
Defendant and
Third-Party Plaintiff

v.

THOMAS LAWRENCE
Third-Party Defendant

No. 3:06-cv-00565
Judge Trauger

RESPONSE TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT TENNESSEE VALLEY AUTHORITY

Pursuant to Fed. R. Civ. P. 33, and without waiving the right to object to the admissibility into evidence of any response herein, Defendant Tennessee Valley Authority (TVA) hereby responds to Plaintiff's First Set of Interrogatories.

* * *

Interrogatory 17: If TVA asserts an ownership interest in the waterway where the drowning of Mr.

Matheny occurred, please state specifically what real property TVA asserts ownership in.

Response: As summarized in *Cumberland Steam Plant, Construction Summary 1968-1973, Technical Report* (1973) (excerpted copies are being produced with the service copies hereof at Bates Nos. 516-547), TVA's Cumberland Plant "is located on the left bank of Barkely Reservoir, at Cumberland River mile 103, about one mile downstream from Cumberland City, Tennessee." TVA purchased and/or condemned 1225 acres along the left descending bank of the Cumberland River for the Cumberland Reservation. An additional 275 acres was purchased and/or condemned on the right descending bank for construction of a new navigation channel on the Cumberland River. "Because loaded and unloaded coal barges moored to docking cells would extend out into" the then-existing "river channel" for the Cumberland River, in the early 1970s, TVA constructed a new river channel, 400 feet wide and approximately 8,800 feet long on the 275 acres purchased by TVA along the then right descending bank of the Cumberland River. Construction of the new river channel created an island (approximately 6,000 feet long) between the old channel and the new channel (see drawing entitled "Navigation Chanel, Dock, and Spoil Area" which is being produced with the service copies hereof at Bates No. 548). In the area of the old channel, TVA constructed "44 sheet pile, stone-filled and concrete-capped cells." "Twenty-one cells are utilized for docking and handling coal

barges" and "[n]ineteen cells" are used to support the "skimmer wall" and for "docking empty coal barges." TVA also constructed a barge-unloading facility in the fleeting area. TVA asserts that through the various purchases and construction activities set out above, together with flowage easements between TVA and the Army Corps of Engineers, TVA owns, controls, or otherwise occupies the area where the accident at issue occurred and has done so since the early 1970s.

* * *